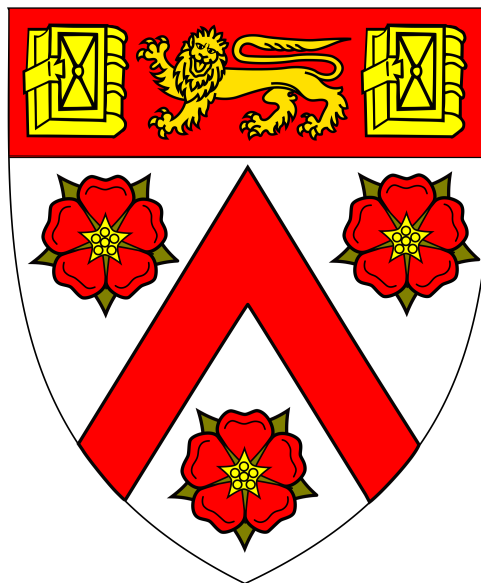


THE FEDERAL EVOLUTION OF IMPERIAL GERMANY (1871-1918)

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This dissertation is submitted to the University of Cambridge
for the degree of Doctor of Philosophy.

June 2017

DECLARATION

This dissertation is the result of my work and includes nothing which is the outcome of work done in collaboration.

This dissertation is also not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared and specified in the text.

The length of this dissertation is under 80 000 words.

Oliver F. R. Haardt

June 2017

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This dissertation and the book that will grow out of it are the result of seven years of work. Since I came to Cambridge in 2010, I have devoted my studies to understanding the complex workings of the imperial federal state. On this long road, I have received help from numerous people.

I am most grateful for the support, guidance, encouragement, and friendship of my supervisor Prof. Sir Christopher Clark (St Catharine's College Cambridge), the mastermind of modern European history, who has taught me how historians think and write. Prof. Michael Stolleis (Max Planck Institute for European Legal History, Frankfurt am Main), the universal scholar of German history and law, has become not only a close mentor, but also a friend. I am also most thankful to Prof. Andreas Fahrmeir (Goethe Universität Frankfurt am Main) and Prof. Dominic 'Chai' Lieven (Trinity College Cambridge) for many hours of friendly discussions about my work and the world of history more generally. Special gratitude goes out to Prof. Reinhard Zimmermann (Max Planck Institute for Comparative and International Private Law, Hamburg), President of the *Studienstiftung des Deutschen Volkes*, who has encouraged me to use my work as a platform for an academic career.

I am deeply indebted to Trinity College Cambridge, which is an island of tranquillity and source of inspiration that has provided me with perfect conditions for writing this thesis. Many thanks also go to Magdalene College Cambridge, whose offer of a Junior Research Fellowship has helped me greatly to stay confident in the last phase of the writing process. The Max Planck Institute for European Legal History in Frankfurt am Main also deserves special mention. My time as a fellow of the International Max Planck Research School for Comparative Legal History has laid the foundation for this thesis. Moreover, the institute's library has provided me with almost all my sources. My thanks go to all researchers and members of staff there, who are incredibly supportive and proficient.

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helped me finish the thesis. I am also much obliged to the *Deutsche Universitätsstiftung* and the jury of the ‘JEV-Stipendium für europäische Verwaltungsgeschichte’ around Dr Peter Collin (Max Planck Institute for European Legal History, Frankfurt am Main) for funding the writing-up period of the book.

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My friends and family have provided me with more support and love than I could ever thank them for. Moritz and Ben – thanks for always being up for finding some distraction; Thomas – thanks for being such a loyal companion through the Cambridge years; and Justus – a thousand thanks for being the friend that you are. My siblings and their children have always managed to cheer me up during the long hours of writing and research. Their contribution to my work is bigger than they know. And finally, for all their encouragement, help, trust, and patience over the years, without which I could not have achieved anything, my greatest thanks go to my loving parents, to whom this dissertation is dedicated.

Oliver F. R. Haardt

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THE FEDERAL EVOLUTION OF IMPERIAL GERMANY (1871-1918)

This dissertation examines the evolution of federal government in the German Empire from the unification in 1871 to the collapse of the monarchy in 1918. The story of how the imperial federal state changed over the four and a half decades of its existence has hitherto been hidden from view by disciplinary biases and methodological limitations. While concentrating on how Germany's peculiar form of government oscillated between a Western-style constitutional monarchy and a semi-absolutist autocracy, historians have failed to make sense of deeper systemic issues. In order to move these to the centre of analysis, the thesis combines different perspectives from history, law, and political theory.

This approach exposes an extraordinary development. The 1871 constitution left Germany's organisational nature largely undefined. The new national state possessed only very few institutions and competences. There was not even a national government. The *Reich* completely depended on the constituent states. This weakness was no coincidence. Bismarck's plan was to secure the dominance of the Prussian monarchy by giving the union enough flexibility to develop either into an integrated composite state or a loose cooperative assembly of states. But the decades after unification turned out differently. By seizing control over the Prussian administration, the federal bureaucracy gradually acquired so many competences that by the outbreak of the First World War Germany had changed into a centralised state. Rather than by the collaboration of the monarchical state governments, national decision-making was now shaped by the competition and cooperation of the federal parliament – the *Reichstag* – and the newly emerged federal government around the Chancellor.

This transformation came about, the thesis argues, because both monarchical and democratic actors – above all the Prussian government, the federal bureaucracy, and the national parliament – saw federal structures primarily as an instrument of power to be manipulated for their own purposes, namely for the preservation of princely prerogatives or for the expansion of parliamentary rights. There was little respect for federalism as an organisational principle that was beneficial per se (for example because it devolved power to a regional level). Rather, most executives, administrators, and parliamentarians understood Germany's federal organisation – albeit for different reasons – as a necessary evil and a means to an end. This attitude had a lasting impact on German political culture, with federal structures remaining at the mercy of power interests throughout the twentieth century.

The dissertation is woven from three different strands. By combining them, it can draw connections that would not come into view if it concentrated on just one of these themes. First, it is a history of German federalism that focuses on the key question of the political history of the Empire: who or what actually governed Germany? As it thus exposes the anatomy of power in the imperial state, it is also a contribution to one of the biggest controversies in modern European history, namely the debate on Germany's alleged 'special path': where did Germany go wrong? Thirdly and lastly, the thesis offers a systemic analysis of federal structures whose observations are relevant for federal orders – such as the European Union – more generally.

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NOTES ON THE TEXT AND TRANSLATION

This dissertation is composed of five chapters. The book that will grow out of it comprises three additional chapters, which could not be included into the thesis for reasons of space. Details are provided in the Introduction.

The appendix comprises a journal article on the development of the constitutional powers and functions of the Emperor, which I have published in *German History* in December 2016. The main text of the thesis will refer to it where relevant. It supplements, in particular, Chapter 4, which examines the evolution of the relationship between the different constitutional organs on the one hand and between the national level and the states on the other. Details on how the article relates to this analysis are provided in Chapter 4. (NB: As it is published material, the article is not included into the word count).

All tables, figures, photos, maps, and caricatures can be found either at the beginning or at the end of the chapter in which they are discussed, unless otherwise indicated. References concerning the tables are provided directly beneath them. The figures displaying the statistical analysis of the *Bundesrat* protocols and the material they are based on are discussed in detail in the main text of Chapter 5. The links to the caricatures as well as the credits of the photos and maps can be found in the list of pictures, maps, and caricatures.

Frequently used primary sources, source collections, and secondary literature are abbreviated in the footnotes. Full references can be found in the list of abbreviations and/or the bibliography.

All quotes in the main text are translated into English. The original version can be found in the footnotes. All translations are by me, unless otherwise indicated. In translating the German constitutions of 1848, 1867/71, 1919, and 1949, I have largely followed the translation provided by Hucko, Elmar M. *The Democratic Tradition. Four German Constitutions*. Oxford: Berg, 1989.

LIST OF ABBREVIATIONS

| | |
|--|---|
| <i>Annalen</i> | <i>Annalen des Deutschen Reichs für Gesetzgebung, Verwaltung und Statistik</i> , ed. Georg Hirth (Leipzig: Hirth, 1871-1918). |
| art. | article |
| Bezold/Holtzendorff, <i>Materialien</i> | Bezold, Ernst, and Franz von Holtzendorff, eds. <i>Materialien der Deutschen Reichs-Verfassung. Sammlung sämtlicher auf die Reichs-Verfassung, ihre Entstehung und Geltung bezüglichen Urkunden und Verhandlungen, einschließlich insbesondere derjenigen des constituirenden Norddeutschen Reichstages 1867</i> . 3 vols. Berlin: Habel, 1873. |
| BGBI. NDB | <i>Bundesgesetzblatt des Norddeutschen Bundes</i> (Federal Law Gazette of the North German Confederation) |
| BGBI. FRG | <i>Bundesgesetzblatt der Bundesrepublik Deutschland</i> (Federal Law Gazette of the Federal Republic) |
| Binder, <i>Reich</i> | Binder, Hans-Otto. <i>Reich und Einzelstaaten während der Kanzlerschaft Bismarcks 1871-1890. Eine Untersuchung zum Problem der bundesstaatlichen Organisation</i> . Tübingen: Mohr Siebeck, 1971. |
| Björner, <i>Verfassungsgerichtsbarkeit</i> | Björner, Ulf. <i>Die Verfassungsgerichtsbarkeit im Norddeutschen Bund und Deutschen Reich (1867-1918): eine rechtshistorische Untersuchung über Gerichtsbarkeit im Spannungsfeld von Politik und Recht innerhalb der von Bismarck geschaffenen deutschen Bundesstaaten</i> . Rechtshistorische Reihe 214. Frankfurt am Main: Lang, 2000. |
| Bönnemann, <i>Verfassungskonflikte</i> | Bönnemann, Claus. <i>Die Beilegung von Verfassungskonflikten vor der Zeit des Grundgesetzes: die Entwicklung verfassungsgerichtlicher Strukturen in Deutschland, ausgehend vom Frühkonstitutionalismus bis zum Ende der Weimarer Republik</i> . Potsdamer rechtswissenschaftliche Reihe 23. Berlin: Frank & Timme, 2007. |
| <i>Bundesacte</i> (1815) | 1815 <i>Deutsche Bundesacte</i> (Basic law of the German Confederation) |
| Deuerlein, <i>Augenzeugenberichte</i> | Deuerlein, Ernst, ed. <i>Die Gründung des Deutschen Reiches 1870/71 in Augenzeugenberichten</i> . Düsseldorf: Rauch, 1970. |

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| <i>Drucksachen (DR)</i> | <i>Drucksachen zu den Verhandlungen des Bundesrates des Deutschen Reiches</i> (1871-1918) (Printed Papers of the <i>Bundesrat</i> of the German Empire) |
| <i>Drucksachen (NDB)</i> | <i>Drucksachen zu den Verhandlungen des Bundesrates des Deutschen Reiches</i> (1871-1918) (Printed Papers of the <i>Bundesrat</i> of the North German Confederation) |
| EC (1849) | 1849 Draft Constitution of the Erfurt Union (<i>Erfurter Unionsverfassung</i>) |
| FC (1849) | 1849 Draft Constitution of the Frankfurt Assembly (<i>Frankfurter Paulskirchenverfassung</i>) |
| Fenske, <i>Reichsgründung</i> | Fenske, Hans, ed. <i>Der Weg zur Reichsgründung 1850-1870</i> . Quellen zum politischen Denken der Deutschen im 19. und 20. Jahrhundert. Freiherr vom Stein-Gedächtnisausgabe 5. Darmstadt: WBG, 1977. |
| Fenske, <i>Bismarcksches Reich</i> | Fenske, Hans, ed. <i>Im Bismarckschen Reich 1871-1890</i> . Quellen zum politischen Denken der Deutschen im 19. und 20. Jahrhundert. Freiherr vom Stein-Gedächtnisausgabe 6. Darmstadt: WBG, 1978. |
| Fenske, <i>Wilhelm II.</i> | Fenske, Hans, ed. <i>Unter Wilhelm II. 1890-1918</i> . Quellen zum politischen Denken der Deutschen im 19. und 20. Jahrhundert. Freiherr vom Stein-Gedächtnisausgabe 7. Darmstadt: WBG, 1982. |
| FRGBL | <i>Reichsgesetzblatt der Frankfurter Nationalversammlung</i> (Law Gazette of the Frankfurt Assembly) |
| GBL DDR | <i>Gesetzblatt der Deutschen Demokratischen Republik</i> (Federal Law Gazette of the German Democratic Republic) |
| <i>Gesammelte Werke</i> | Bismarck, Otto von. <i>Gesammelte Werke</i> . Edited by Holger Afflerbach, Konrad Canis, Lothar Gall, Klaus Hildebrand, and Eberhard Kolb. Neue Friedrichsruher Ausgabe. Abteilung 3: 1871-1918, Schriften. 9 vols. (Paderborn: Schöningh, 2004-). |
| <i>Geschäftsordnung</i> (1871) | 1871 <i>Geschäftsordnung des Bundesrates des Deutschen Reiches</i> (By-laws of the <i>Bundesrat</i>) |
| <i>Geschäftsordnung</i> (1880) | 1880 <i>Revidierte Geschäftsordnung des Bundesrates des Deutschen Reiches</i> (Revised by-laws of the <i>Bundesrat</i>) |

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| GG (1949) | 1949 <i>Grundgesetz</i> (Basic Law of the Federal Republic) |
| Goldschmidt, <i>Kampf</i> | Goldschmidt, Hans. <i>Das Reich und Preußen im Kampf um die Führung. Von Bismarck bis 1918</i> . Berlin: Heymann, 1931. |
| <i>Handbuch</i> | <i>Handbuch für das Deutsche Reich</i> . Edited by Reichskanzleramt (1874-1878) and Reichsamt des Innern (1879-1918). Berlin: Heymanns, 1874-1918. |
| Holste, <i>Bundesstaat</i> | Holste, Heiko. <i>Der deutsche Bundesstaat im Wandel (1867-1933)</i> . Schriften zur Verfassungsgeschichte 65. Berlin: Duncker & Humblot, 2002. |
| Huber, <i>Dokumente</i> | Huber, Ernst Rudolf, ed. <i>Dokumente zur deutschen Verfassungsgeschichte</i> . 3rd ed. 4 vols. Stuttgart: Kohlhammer, 1978-1992. |
| Huber, <i>Verfassungsgeschichte</i> | Huber, Ernst Rudolf. <i>Deutsche Verfassungsgeschichte seit 1789</i> . 8 vols. Stuttgart: Kohlhammer, 1957-1991. |
| HZ | <i>Historische Zeitschrift</i> |
| Lilla, <i>Föderalismus</i> | Lilla, Joachim, ed. <i>Föderalismus in historisch-vergleichender Perspektive</i> . Vol. 1 "Der Bundesrat 1867-1919 - ein biographisches Nachschlagewerk". Schriftenreihe des Instituts für Europäische Regionalforschungen 20. Baden-Baden: Nomos, 2014. |
| NDBV (1867) | 1867 Constitution of the North German Confederation (<i>Norddeutsche Bundesverfassung</i>) |
| PC (1850) | 1850 Prussian Constitution |
| Poschinger, <i>Bundesrat</i> | Poschinger, Heinrich von. <i>Fürst Bismarck und der Bundesrat</i> . 5 vols. Stuttgart & Leipzig: Deutsche Verlags-Anstalt, 1898-1901. |
| <i>Protokolle (DR)</i> | <i>Protokolle der Verhandlungen des Bundesrates des Deutschen Reiches</i> (1871-1918) (Protocols of the <i>Bundesrat</i> of the German Empire) |
| <i>Protokolle (NDB)</i> | <i>Protokolle der Verhandlungen des Bundesrates des Norddeutschen Bundes</i> (1867-1870) (Protocols of the <i>Bundesrat</i> of the North German Confederation) |
| <i>Protokolle (PSM)</i> | <i>Protokolle des Preußischen Staatsministeriums</i> (Protocols of the Prussian State Ministry) |
| Rauh, <i>Föderalismus</i> | Rauh, Manfred. <i>Föderalismus und Parlamentarismus im</i> |

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| | <i>Wilhelminischen Reich</i> . Beiträge zur Geschichte des Parlamentarismus und der politischen Parteien 47. Düsseldorf: Droste, 1973. |
| Rauh, <i>Parlamentarisierung</i> | Rauh, Manfred. <i>Die Parlamentarisierung des Deutschen Reiches</i> . Beiträge zur Geschichte des Parlamentarismus und der politischen Parteien 60. Düsseldorf: Droste, 1977. |
| RGBl. | <i>Reichsgesetzblatt</i> (Federal Law Gazette of the German Empire) |
| RV (1871) | 1871 Constitution of the German Empire (<i>Reichsverfassung</i>) |
| SC (1848) | 1848 Swiss Constitution |
| SC (1874) | 1874 Swiss Constitution |
| SC (1999) | 1999 Swiss Constitution |
| sect. | section |
| <i>Stenographische Berichte (DR)</i> | <i>Stenographische Berichte über die Verhandlungen des Deutschen Reichstages</i> (1871-1918) (Protocols of the <i>Reichstag</i> of the German Empire) |
| <i>Stenographische Berichte (NDB)</i> | <i>Stenographische Berichte über die Verhandlungen des Reichstages des Norddeutschen Bundes</i> (1867-1870) (Protocols of the <i>Reichstag</i> of the North German Confederation) |
| USC (1787) | 1787 US Constitution |
| WBG | Wissenschaftliche Buchgesellschaft |
| WRV (1919) | 1919 Weimar Constitution (<i>Weimarer Reichsverfassung</i>) |
| WSA (1820) | 1820 Vienna Final Act (<i>Wiener Schlußacte</i>) |
| VVDStRL | <i>Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer</i> (Journal of the Association of German Constitutional Lawyers) |

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INTRODUCTION



Picture 1: Anton von Werner, *Die Proklamierung des Deutschen Kaiserreiches*, 1885, Friedrichsruh version.



Picture 2: Anton von Werner, *Die Proklamierung des Deutschen Kaiserreiches*, 1877, photograph of the original version in the Berlin Palace.

Anton von Werner's 1885 *Proclamation of the German Empire* continues to shape the view that we have of Imperial Germany today. It is hard to find an academic study, a piece of popular history, or a textbook that does not illustrate the unification of 1870/71 with reference to this history painting. The Prussian court painter who witnessed the proclamation with his very eyes in the *Galerie des Glaces* of Versailles on 18 January 1871 offers us a front view of the ceremony (see Picture 1). In the centre, Bismarck dominates the scene in a white gala uniform, the proclamation charter still in hand. From a podium, William of Prussia receives the homage of the surrounding Prussian military officers. Crown prince Frederick and the Duke of Baden stand on either side of the new Emperor, the latter raising his arm to give William three cheers. It has often been pointed out that there are no popular representatives in the painting, their absence reflecting the fact that Germany's unification was an act of aristocratic statesmanship and military power rather than of popular sovereignty.¹ More than any other problem, the parliamentary deficit that flowed from this foundation has dominated the historiographical discussion about the imperial state.

This, however, is only half the story behind the painting. Few people know that the 1885 picture is only the second version of the *Proclamation*, which William I commissioned as a gift for Bismarck's seventieth birthday. The original, which von Werner had painted for the Berlin Palace between 1871 and 1877, was lost in the Second World War, but survives as a black-and-white photograph (see Picture 2). It differs from its later counterpart profoundly. Instead of a front view, von Werner chose a diagonal perspective that underlines the isocephalic array of heads cheering the new emperor. These heads belong to the princes and military officers of the German states, whom the later redaction largely replaced by Prussian

¹ See for example Daniel Schulz, *Verfassung und Nation: Formen politischer Institutionalisierung in Deutschland und Frankreich* (Wiesbaden: Springer, 2013), p. 144 and Bernd Jürgen Wendt, "Von der Erbfeindschaft zur Partnerschaft. Die deutsch-französischen Beziehungen von Bismarck bis Adenauer," in *Otto von Bismarck und das "lange 19. Jahrhundert": Lebendige Vergangenheit im Spiegel der "Friedrichsruher Beiträge" 1996-2016*, ed. Ulrich Lappenküper (Paderborn: Schöningh, 2017), p. 558.

figures. While Bismarck and the new Kaiser dominate the second version, they are hard to pick out in the original.

We can thus see how the pattern of emphasis has shifted. The original painting depicts the union of princes and characterises it as an egalitarian brotherhood in arms whose members acclaim their leader as a *primus inter pares*. In contrast, the 1885 version marginalises the federal allies and celebrates the unification as an act of Prussian hegemony that establishes a national *Kaisertum*.²

Here, then, von Werner put the teleological political programme of the contemporary Borussian historians around Johann Gustav Droysen and Heinrich von Treitschke on canvas: he conveys a more Prussianised, more nationalised, and more centralised account of the unification than in the rather confederate original.³ Through the contrast between them, the two versions of the *Proclamation* draw our attention to the second main feature of the imperial German state, a feature easier to overlook than its undemocratic form of government, namely Germany's organisation as a federal union of states.

This union was unique. Germany's unification created an organisational entity unprecedented in the history of modern statehood: a national state in the form of a permanent union of sovereign princes. While both monarchical unions and federal states had been around before, they had never been combined. After the failure of the 1848 revolution and the Frankfurt Parliament, whose draft constitution had proposed a parliamentary and more unitary solution to the problem of German statehood, the legal historian and national-liberal politician Georg Waitz concluded with reference to a statement by the Prussian diplomat Christian von Bunsen that

² For a comprehensive history and interpretation of the painting, see Thomas Gaethgens, *Anton von Werner: Die Proklamierung des Deutschen Kaiserreiches. Ein Historienbild im Wandel preußischer Politik* (Frankfurt am Main: Fischer, 1990).

³ On the Borussian School of history writing, see for example Robert Southard, *Droysen and the Prussian School of History* (Lexington, KY: University Press of Kentucky, 1995).

Germany has obviously the mission to develop the constitutional monarchy in the form of the federal state and thus to generalise and elevate this type [of state] to a new rank. Or, to look at it from the other side: Germany is called to give to the form of the free federal state a new [...] direction in the history of the world.⁴

Waitz was under no illusion, however, about the immense difficulties that stood in the way of the creation and operation of a monarchical federal state. The failure of the 1849 Frankfurt constitution had exposed the key problems: How could monarchical power be preserved in the presence of a national parliament? And how should the relations of the hegemonic state Prussia, the middling states, and the small states to each other and to the national level be arranged in order to create a stable union? The shadows of 1848/49 suggested that Germany's long-standing tradition as a multi-state order – first in the Holy Roman Empire and then in the German Confederation – would make finding a solution to these problems more difficult rather than easier.

Yet, the 1871 constitution did not clarify any of these issues. In fact, it left the most fundamental problem of whether the new nation state was a federation, confederation, or any other type of union deliberately unsettled. This was in part a function of Bismarck's effort to accommodate two conflicting principles: the legally guaranteed sovereignty of the princes and their states; and the reality of Prussian hegemony. He explained his intentions as early as 1866:

Concerning the form [of the new German state], one will need to adhere more to a confederation, but in practice give it the nature of a federal state with elastic, inconspicuous, but far-reaching manifestations.⁵

⁴ ['Deutschland hat offenbar den Beruf, die konstitutionelle Monarchie in der Form des Bundesstaates zu entwickeln und dadurch den Typus derselben zu verallgemeinern und zu einer höheren Geltung zu erheben. Oder, von der anderen Seite her betrachtet: Deutschland ist berufen, der Form des freien Bundesstaates eine neue [...] Entwicklung in der Weltgeschichte vorzuzeichnen'] Georg Waitz, "Das Wesen des Bundesstaates. Reden und Betrachtungen von J. v. Radowitz," *Allgemeine Monatsschrift für Wissenschaft und Literatur*, 1853, 494–530, printed in Fenske, *Reichsgründung*, no. 18, p. 91.

⁵ ['Man wird sich in der Form mehr an den Staatenbund halten müssen, diesem aber praktisch die Natur des Bundesstaates geben mit elastischen, unscheinbaren, aber weitgreifenden Ausdrücken.'] Quoted in Reinhart Koselleck, "Bund," ed. Otto Brunner and Werner Conze, *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett, 1997), p. 668. This remark was part of Bismarck's famous *Putbusser Diktat* on 30 October 1866. On the views that he formed in Putbus on the constitution and government of the future German national state, see Otto Becker, *Bismarcks Ringen um*

Bismarck's idea was straightforward: if it was inevitable to create a national state and to involve a parliament in its government, then Prussian dominance and monarchical power had to be secured by giving the union enough flexibility to develop into either an integrated composite state (federation) or a loose cooperation of states (confederation). This rationale resulted in a striking vagueness of the constitution. Although Imperial Germany comprised several levels of government, her constitution established only seventy-eight articles, half of which were technical administrative provisions. While two bulky articles alone dealt with the correct taxation of brandy, not a single paragraph defined whether Germany was a federal or confederate state.⁶

To be fair, it is not at all unusual for federal states to be based on rudimentary written constitutions that leave the development of more precise arrangements to political practice. The 1787 constitution of the United States, for example, comprises no more than seven original articles, which are now supplemented by twenty-seven amendments and numerous Supreme Court decisions. Federal constitutions tend to confine themselves to regulating only the most basic questions about the functions of constitutional organs, the competences of different levels of government, and the separation of powers. But even the briefest federal constitutions usually define at least some organisational principles that determine in what direction the union will evolve in future.⁷ The German constitution of 1871, however, did not do so. It left the evolution of the federal state entirely undetermined, thus subjecting it to the vagaries of a political environment that was shaped by the growing conflict between monarchical and parliamentary power.

From this perspective, it is not surprising that over the course of the economic, social, and cultural integration in the decades following the unification Germany evolved far beyond her

Deutschlands Gestaltung, ed. Alexander Scharff (Heidelberg: Quelle & Meyer, 1958), chapter 8 'Bismarcks Putbuser Entscheidung', pp. 236-64.

⁶ For the regulations concerning brandy, see RV (1871), art. 34, 38.

⁷ See for example USC (1787), art. 4, which defines the states relations, makes provisions about the accession of new states to the union, and guarantees the republican form of government of the states.

open-ended constitutional framework. As more and more competences came under the federal remit, the states were gradually marginalised and the national level became the real centre of power. Among the federal constitutional organs, power shifted from the council of state governments, the *Bundesrat*, to the newly emerged federal administration under the Chancellor, to the Emperor, and to the federal parliament, the *Reichstag*. These developments changed the German nation state completely. In 1874, Heinrich von Treitschke – having his eye on the Prussian dominance in the union – still spoke of a ‘national monarchy with confederate institutions’.⁸ Thirty-three years later, the constitutional lawyer Heinrich Triepel noted that Germany ‘has already walked down half the road to a [centralised] Reich monarchy’.⁹

Triepel’s observation gives us a preliminary sense of how dramatic Germany’s federal evolution was. Nonetheless, it seems difficult to picture it concretely. This is because often it manifested itself not in conspicuous structural innovations, such as the creation of new national institutions, but in subtle systemic changes. Moreover, the concepts we are used to employing when describing the development of federal states – such as centralisation or mediatisation – are rather abstract. So is the term federalism. This does not mean, however, that federal evolution is an issue that is hard to grasp. On the contrary: when we look behind the abstractions, it soon becomes clear how concrete a problem it is.

The phenomenon of federal evolution embraces dynamic processes on two distinct, but interrelated levels of government. On the one hand, the relations between the states – the *Länder* – and the national level – the Reich – constituted the vertical coordination of the imperial federal state. Centralisation meant the quantitative and qualitative shift of

⁸ [‘nationale Monarchie mit bündischen Institutionen’] Heinrich von Treitschke, “Bund und Reich,” *Preußische Jahrbücher* 34 (1874), p. 536.

⁹ [‘den Weg zur [zentralisierten] Reichsmonarchie schon mehr als zur Hälfte zurückgelegt’] Heinrich Triepel, *Unitarismus und Föderalismus im Deutschen Reiche. Eine staatsrechtliche und politische Studie*. (Tübingen: Mohr, 1907), p. 72.

competences from the *Länder* to the Reich. This could go so far as to relegate some or all of the states to political impotence, in which case we speak of mediatisation.

On the other hand, the relations between the confederate (*Bundesrat*) and unitary (Emperor, Chancellor, *Reichstag*) constitutional organs on the national level formed the horizontal coordination of the federal state. Here, centralisation increased the authority of the latter at the expense of the former, with the result that constitutional functions shifted. This process unfolded in a much more subtle way than the marginalisation of the states. It became manifest in changes of political practice, for example in how over time the Chancellors altered their approach to dissolving the *Reichstag*. The constitution conferred this power upon the *Bundesrat*.¹⁰ Bismarck therefore took great care to base the dissolution of the parliament in 1878 on a common decision of the state governments in the *Bundesrat*. Fifteen years later, however, his successor Leo von Caprivi no longer saw any need for a confederate consensus. He merely discussed the matter with the *Bundesrat* plenipotentiaries of the states in an extraordinary session. Things changed further in the new century. By 1906, Bernhard von Bülow felt able publicly to announce the dissolution of the *Reichstag* on his own initiative. Only a few days after his decision had been implemented did he put it to the vote of the *Bundesrat*.¹¹

This behaviour was outright unconstitutional and indicated a shortage of respect for the federal organisation of Germany. As such, it was one incident among many that revealed how political actors, both monarchical and parliamentary, saw federal arrangements merely as an instrument of power. This instrumental character made federal politics highly complex. While the *Reichstag* tried to change the federal order to the effect that it could expand its powers and make the executive parliamentarily responsible, the monarchical governments wanted to prevent precisely that. In this conflict, federal provisions were sometimes bent in one

¹⁰ RV (1871), art. 24.

¹¹ On the changing practice of *Reichstag* dissolutions, see: Holste, *Bundesstaat*, pp. 212f.; Huber, *Verfassungsgeschichte*, vol. 4, p. 294; and Rauh, *Parlamentarisierung*, pp. 17f.

direction, sometimes in another, depending on whose interests dominated at the time. As a matter of principle, monarchical actors tried to keep the union as confederate as possible. Leaving most powers with the state governments and the *Bundesrat* implied that the federal parliament would stay relatively weak and that no federal executive under the Chancellor and Emperor would emerge that the *Reichstag* could attempt to hold accountable. For exactly the same reasons, parliamentarians and democrats had a basic interest in centralising the federal system as much as possible.

These conflicting interests were the reason for many oddities in the German federal union. According to the constitution, a national government did not exist. Bismarck even prohibited the use of the term *Reichsregierung* when a comprehensive apparatus of federal ministries evolved in the first two decades following unification.¹² These ministries, the so-called *Reichsämtler*, were formally mere auxiliary offices to the Chancellor, the only official minister of the Reich. Although they came to prepare most federal legislation, the constitution knew of no mechanism by which they could introduce bills into the legislative process. In order to become active in the machinery of federal government, the executives of the *Reichsämtler* had to become members of the Prussian bench in the *Bundesrat*. The Kaiser was not the monarch of the Reich.¹³ He was not even allowed to move around his empire as he liked. To take the waters in Baden-Baden, for example, he needed the explicit invitation of the Duke of Baden. Rather than the Emperor, the ‘collectivity of united governments’ was considered the sovereign of Germany.¹⁴ The central constitutional organ was therefore the *Bundesrat*, which

¹² See Bismarck’s letter to Paul Eck, director in the Federal Department of the Chancellor, 1 September 1877, printed in *Gesammelte Werke*, vol. 3, no. 164, p. 214. See also Eduard Rosenthal, *Die Reichsregierung. Eine staatsrechtliche und politische Studie* (Jena: Fischer, 1911), p. 76.

¹³ On this issue, see Oliver F. R. Haardt, “The Kaiser in the Federal State (1871-1918),” *German History* 34, no. 4 (2016), pp. 529-54.

¹⁴ [‘Gesamtheit der verbündeten Regierungen’] See for example Adolf Arndt, *Das Staatsrecht des Deutschen Reiches* (Berlin: Häring, 1901), p. 114; Paul Laband, *Das Staatsrecht des Deutschen Reiches*, 5th ed., vol. 1, 4 vols. (Tübingen: Mohr, 1911), p. 97; Otto Mejer, *Einleitung in das Deutsche Staatsrecht*, 2nd ed. (Freiburg & Tübingen: Mohr, 1884), p. 280; Georg Meyer, *Lehrbuch des Deutschen Staatsrechts*, ed. Gerhard Anschütz, 7th ed. (Leipzig & München: Duncker & Humblot, 1919), pp. 419-23; and Philipp Zorn, *Das Staatsrecht des Deutschen Reiches*, 2nd ed., vol. 1: Das Verfassungsrecht, 2 vols., Guttentag’sche Sammlung

enjoyed powers across the legislature, executive, and judiciary. Although all state governments exercised voting rights in the council, many of them had no special envoy for this purpose. This led to unusual alliances that overcame regional divides. The Bavarian government, for instance, often cast the Hamburg vote. At times, the Hessian plenipotentiary represented up to ten different states in the *Bundesrat*. Appointment powers often seemed random, too. The Bavarian king, for example, was the only monarch of the Reich who had the privilege of appointing the judges of a special senate at the federal military court.¹⁵

This list of federal curiosities could be continued almost ad infinitum. However, the point here is that these examples suggest not only how complex the imperial federal state was; but also that the reason behind this complexity were dynamic conflicts of power that made the allegedly abstract process of federal evolution very concrete in constitutional reality.

Due to these concrete manifestations, historians have long realised that federal evolution was a key problem in the development of the state and politics of Imperial Germany.¹⁶ Nonetheless, they have largely ignored it because they have focused on other questions of statehood, most importantly on Germany's ambiguous form of government that they have situated somewhere between a Western-style constitutional monarchy and a semi-absolutist autocracy. The German historian Hans-Peter Ullmann has rightly pointed out that while it is principally known that Germany underwent centralisation, the question of 'when [...] and where [...] the system and practice of political rule changed has not been sufficiently

von Lehrbüchern des Deutschen Reichsrechtes 5 (Berlin: Guttentag, 1895), p. 90. See also Holste, *Bundessaat*, p. 254, where he also refers to these lawyers.

¹⁵ Paul Laband, "Die geschichtliche Entwicklung der Reichsverfassung seit der Reichsgründung," *Jahrbuch des öffentlichen Rechts der Gegenwart* 1 (1907), p. 40. See also Holste, *Bundesstaat*, p. 242, fn. 796.

¹⁶ The importance of federalism as a key problem of the imperial state has probably been stated most clearly by Hans Boldt in his short essay "Der Föderalismus im Deutschen Kaiserreich als Verfassungsproblem," in *Innere Staatsbildung und gesellschaftliche Modernisierung in Österreich und Deutschland 1867/71-1914*, ed. Helmut Rumpler (Munich: Oldenbourg, 1991), 31–41.

researched'.¹⁷ In other words, we know that the union became more centralised, but not how or why, to what extent, in what context, or to what effect.

There are, in fact, only two studies that make the imperial federal state their subject of analysis. Both suffer from the methodological biases of legal and political historiography, respectively. Heiko Holste has examined how the federal union developed in the Empire and the Weimar Republic.¹⁸ But his study is confined to the evolution of the legal norms of the federal system, and does not embed these into the political history of Germany. Hans-Otto Binder has taken exactly the opposite approach in his analysis of the relations between the constituent states and the national level during Bismarck's chancellorship.¹⁹ While he reconstructs the political motivations and modes of negotiations in the *Bundesrat*, he ignores how the normative framework changed over time, for example in regard to the legislative functions of the federal constitutional organs. Holste's and Binder's works are thus a reminder that in order to write a holistic study of federal evolution we must overcome traditional disciplinary divides between legal and conventional historiography. It is impossible to take the federal state fully into view if we neglect either its normative framework or its political context.

Across disciplines, there has recently been a slight rise of interest in the history of German federalism. Maiken Umbach, for example, has edited a book on German federalism since the eighteenth century that includes contributions by some of the finest historians, linguists, and political scientists of modern Germany.²⁰ The imperial federal state has received more attention on the initiative, in particular, of scholars at the institutes of European Studies in Siegen and Vienna. In a short essay, Christian Henrich-Franke has demonstrated that simple models from political science can help us to understand the changing functions of the

¹⁷ ['Wann [...] und wie [...] sich [...] System und Praxis politischer Herrschaft änderten, ist noch nicht gründlich erforscht.'] Hans-Peter Ullmann, *Politik im Deutschen Kaiserreich 1871-1918*, Enzyklopädie Deutscher Geschichte 52 (Munich: Oldenbourg, 2005), p. 83.

¹⁸ Holste, *Bundesstaat*.

¹⁹ Binder, *Reich*.

²⁰ Maiken Umbach, ed., *German Federalism. Past, Present, Future* (New York: Palgrave Macmillan, 2002).

legislative organs.²¹ So far, the new series ‘Federalism in Historical-Comparative Perspective’ comprises a detailed catalogue of the *Bundesrat* plenipotentiaries of the different states and a collection of essays that compare various problems in the federal systems of Imperial Germany, the Habsburg monarchy, and the European Union.²² The Austrian political scientist Hans Kristoferitsch has also published a comparative study, which looks at Germany, the United States, Switzerland, and the European Union, and concentrates on more general patterns of integration theory.²³ While each of these works adopts a very specific approach, they all provide important groundwork for a comprehensive analysis of federal evolution in Imperial Germany.

The same can be said of the many studies that examine individual problems of the federal union, although they often date back several decades, some of them even to the years of the Weimar Republic. Both jurists and historians have tried to make sense of the constitutional role and mode of operation of the *Bundesrat*.²⁴ A few works have charted the dynamic development of the federal administration, both at and below the ministerial level.²⁵ The period of federal evolution that has received most attention is the era of unification, with historians disagreeing about whether it was primarily an act of Prussian leadership and

²¹ Christian Henrich-Franke, “Wandlungen föderalen Regierens im Deutschen Kaiserreich. Die Entscheidungsfindung im Fall der Sozialgesetzgebung,” *Historische Zeitschrift* 293, no. 2 (2011): 373–99.

²² Lilla, *Föderalismus*. Gerold Ambrosius, Christian Henrich-Franke, and Cornelius Neutsch, eds., *Föderalismus in historisch-vergleichender Perspektive*, vol. 2 “Föderale Systeme: Kaiserreich - Donaumonarchie - Europäische Union”, Schriftenreihe des Instituts für Europäische Regionalforschungen 20 (Baden-Baden: Nomos, 2015).

²³ Hans Kristoferitsch, *Vom Staatenbund zum Bundesstaat?: Die Europäische Union im Vergleich mit den USA, Deutschland und der Schweiz*, Schriftenreihe Europainstitut Wirtschaftsuniversität Wien 27 (Vienna: Springer, 2007).

²⁴ See for example Walther Peter Fuchs, “Bundesstaaten und Reich: Der Bundesrat,” in *Zur Problematik “Preußen und das Reich,”* ed. Oswald Hauser, Neue Forschungen zur brandenburg-preussischen Geschichte 4 (Cologne: Böhlau, 1984), pp. 83–104; Heinrich Otto Meisner, “Bundesrat, Bundeskanzler und Bundeskanzleramt (1867–1871),” in *Moderne deutsche Verfassungsgeschichte (1815–1914)*, ed. Ernst-Wolfgang Böckenförde, 2nd ed., Neue Wissenschaftliche Bibliothek Geschichte 51 (Königsstein: Athenäum, 1981), pp. 76–94; and Udo Scholl, *Der Bundesrat in der deutschen Verfassungsentwicklung. Reichsverfassung von 1871 und Grundgesetz*, Schriften zum Öffentlichen Recht 407 (Berlin: Duncker & Humblot, 1982).

²⁵ See Rudolf Morsey's book *Die oberste Reichsverwaltung unter Bismarck 1867–1890*, Neue Münstersche Beiträge zur Geschichtsforschung 3 (Münster: Aschendorff, 1957) and his essay “Zur Geschichte der obersten Reichsverwaltung im Wilhelminischen Deutschland (1890–1900),” *Deutsches Verwaltungsblatt* 24, no. 86 (1971): 8–16. See also Armin Dittmann, *Die Bundesverwaltung. Verfassungsgeschichtliche Grundlagen, grundgesetzliche Vorgaben und Staatspraxis ihrer Organisation*, Tübinger Rechtswissenschaftliche Abhandlungen 56 (Tübingen: Mohr Siebeck, 1983).

Bismarck's statesmanship or, as the modern interpretation holds, a complex negotiation process in which many solutions were possible.²⁶ The relations of all of the major constituent states to the national level have been put on the map since the 1970s, with Saxony being the only exception.²⁷ This gives historians the opportunity to turn now to the hitherto neglected role that these states played collectively as heterogeneous groups – namely as middling and small states – in federal government.

As the federal hegemon, Prussia is a special case. There is no topic of federal organisation that has received more attention than the relations between Prussia and the national state, the so-called Prussian-federal dualism. The controversy has pivoted on whether over the years Prussia came to completely dominate the Reich (*Verpreußung*) or whether the Reich gradually took control over Prussia until it was mediatised (*Verreichung*).²⁸ This has led to endless battles about the numerous overlaps of Prussian and federal institutions and staff, in

²⁶ See the collection of essays in Theodor Schieder and Ernst Deuerlein, eds., *Reichsgründung, 1870-71: Tatsachen, Kontroversen, Interpretationen* (Stuttgart: Seewald, 1970). For the traditional interpretation, see for example Becker, *Bismarcks Ringen um Deutschlands Gestaltung*. For the modern interpretation, see for example Richard Dietrich, "Föderalismus, Unitarismus oder Hegemonialstaat?," in *Zur Problematik "Preußen und das Reich,"* ed. Oswald Hauser, *Neue Forschungen zur brandenburg-preussischen Geschichte* 4 (Cologne: Böhlau, 1984), 49–82 and Fuchs, "Bundesstaaten und Reich: Der Bundesrat.," pp. 87-92.

²⁷ On Bavaria, see Binder, *Reich*; Rauh *Föderalismus*; and Rauh, *Parlamentarisierung*. On Württemberg, see Binder's study and Georg Helmut Kleine, *Der württembergische Ministerpräsident Freiherr von Mittnacht*, *Veröffentlichungen der Kommission für geschichtliche Landeskunde in Baden-Württemberg* 50 (Stuttgart: Kohlhammer, 1961). On Baden, see Hans Klaus Reichert, *Baden am Bundesrat 1871 bis 1890* (Heidelberg: Berenz, 1966) and the following two source collections: Walther Peter Fuchs, *Großherzog Friedrich I. von Baden und die Reichspolitik 1871-1917*, 4 vols., *Veröffentlichungen der Kommission für geschichtliche Landeskunde in Baden-Württemberg* 15, 24, 31, 32 (Stuttgart: Kohlhammer, 1968) and Hermann Oncken, ed., *Großherzog Friedrich I. von Baden und die deutsche Politik von 1854-1871: Briefwechsel, Denkschriften, Tagebücher*, 2 vols. (Stuttgart: Deutsche Verlags-Anstalt, 1927). On the Hanseatic cities, see Helmut Paul Dahl, *Lübeck im Bundesrat 1871-1914. Möglichkeiten und Grenzen einzelstaatlicher Politik im Deutschen Reich* (Lübeck: Schmidt-Römhild, 1969) and Hans-Georg Schönhoff, *Hamburg im Bundesrat. Die Mitwirkung Hamburgs an der Bildung des Reichswillens 1867-1890* (Hamburg: Christians, 1967). On the exception of Saxony, see Fuchs, "Bundesstaaten und Reich: Der Bundesrat.," pp. 86f.

²⁸ The most important works are Heinrich Triepel, *Die Hegemonie. Ein Buch von führenden Staaten* (Stuttgart: Kohlhammer, 1938); Kersten Rosenau, *Hegemonie und Dualismus. Preußens staatsrechtliche Stellung im Deutschen Reich*, *Verfassungsgeschichte der Neuzeit. Studien zur Deutschen Verfassungsgeschichte* (Regensburg: Roderer, 1986); and the collection of essays in Oswald Hauser, ed., *Zur Problematik "Preußen und das Reich,"* *Neue Forschungen zur brandenburg-preussischen Geschichte* 4 (Cologne: Böhlau, 1984). In Hauser, see in particular Walther Hubatsch, "Das preußische Staatsministerium von Bismarck bis zum Ende der Monarchie. Ein Überblick," pp. 165–80, which addresses the under-researched role of the Prussian State Ministry, and Michael Stürmer, "Eine politische Kultur - oder zwei? Betrachtungen zur Regierungsweise des Kaiserreichs," pp. 35–48, which introduces a new perspective focussing on political culture. Goldschmidt, *Kampf* is a special case. In *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, p. 25 Rudolf Morsey has exposed that Goldschmidt produced an emphatically unitary interpretation of Prussian-federal relations, because his work was commissioned by the interior ministry of the Weimar Republic in order to generate support for the centralising reforms of the 1930s. However, the collection of sources that Goldschmidt attached to his interpretation remains the most comprehensive on the subject and, as such, is indispensable.

which there is a striking lack of quantitative evidence. In light of this scattered state of research, it is one principal task of this study to synthesise the insights from the manifold works on individual problems into one coherent narrative of federal evolution.

This narrative must also take into account those works that do not centre on federal questions, but deal with them in the context of other broad historiographical debates on the imperial state. The discussion of Germany's ambiguous form of government – the so-called *Reichskonstitutionalismus* debate – considers the federal union an essential element of the constitutional compromise that made cooperation between monarchical particularists and democratic nationalists at all possible.²⁹ In contrast, the dispute about whether the *Reichstag* gradually succeeded in making the government of the Chancellor responsible – a process that has been dubbed 'silent parliamentarisation' – sees federal structures as a barrier that conservatives erected in order to prevent the parliament from gaining more power.³⁰ Both of these debates form part of a larger controversy that asks what role the state and politics of the Empire played in the course of modern German history, which encompassed two world wars, National Socialism, and the Holocaust.

The most prominent manifestation of this controversy is the debate over the German *Sonderweg*. This argument about Germany's alleged 'special path' to modernity, both politico-constitutional and socio-economic, has shaped the historiographical discussion about modern Europe since the 1970s, involving many of the greatest German and English historians.³¹ While the idea of an Anglo-American norm of modernisation has gradually been

²⁹ Most important are the works by Ernst-Rudolf Huber: "Bismarck und der Verfassungsstaat," in *Nationalstaat und Verfassungsstaat. Studien zur Geschichte der modernen Staatsidee* (Stuttgart: Kohlhammer, 1965), 188–223; "Die Bismarcksche Reichsverfassung im Zusammenhang der deutschen Verfassungsgeschichte," in *Moderne deutsche Verfassungsgeschichte (1815-1914)*, ed. Ernst-Wolfgang Böckenförde, 2nd ed., Neue Wissenschaftliche Bibliothek Geschichte 51 (Königsstein: Athenäum, 1981), 171–207; and his *Verfassungsgeschichte*, vol. 3 and 4. See also Huber's main antagonist Ernst-Wolfgang Böckenförde, "Der Verfassungstyp der deutschen konstitutionellen Monarchie im 19. Jahrhundert," in *Moderne deutsche Verfassungsgeschichte (1815-1914)*, ed. Ernst-Wolfgang Böckenförde, 2nd ed., Neue Wissenschaftliche Bibliothek Geschichte 51 (Königsstein: Athenäum, 1981), 146–70.

³⁰ See most importantly the two works by Rauh, *Föderalismus* and *Parlamentarisierung*.

³¹ See the benchmark works by Hans-Ulrich Wehler, *Das Deutsche Kaiserreich, 1871-1918*, Kleine Vandenhoeck-Reihe 1380 (Göttingen: Vandenhoeck & Ruprecht, 1973), *Deutsche Gesellschaftsgeschichte*,

dropped since the days of David Blackbourn and Geoff Eley, the problem of path-dependencies that steered Germany toward the Nazis' seizure of power and the Holocaust still plays a key role.³² Historians continue to look for the continuities and discontinuities of modern German history.³³ In so doing, they have – as far as political and constitutional structures are concerned – focussed exclusively on Imperial Germany's peculiar form of government. The federal nature of the Empire has played close to no role. In a way, this is understandable because for the first generations of historians after the war the top priority was to make sense of the governmental terror regime of the Nazis, rather than to examine more subtle systemic questions. However, the debate about path-dependencies remains incomplete as long as we neglect one of the two main features of German statehood in the nineteenth and twentieth centuries.

For this reason, this study must relate the federal evolution of Imperial Germany to the broader context of modern German history. This does not mean flogging a dead horse by

2nd ed., vol. 3, 5 vols. (Munich: Beck, 1996), and *Modernisierungstheorie und Geschichte*, Kleine Vandenhoeck-Reihe 1407 (Göttingen: Vandenhoeck & Ruprecht, 1975). In reply to the *Sonderweg* thesis, see above all David Blackbourn and Geoff Eley, *The Peculiarities of German History, Bourgeois Society and Politics in Nineteenth-Century Germany* (Oxford: Oxford University Press, 1984). See furthermore Wolfgang J. Mommsen's two books *Der Autoritäre Nationalstaat: Verfassung, Gesellschaft und Kultur des Deutschen Kaiserreiches*, Fischer Taschenbücher 10525 (Frankfurt am Main: Fischer Taschenbuch Verlag, 1990) and *Das Ringen um den nationalen Staat. Die Gründung und der innere Ausbau des Deutschen Reiches unter Otto von Bismarck 1850 bis 1890*, vol. 7.2, Propyläen Geschichte Deutschlands (Berlin: Propyläen, 1995); Thomas Nipperdey, *Deutsche Geschichte*, 2 vols. (Munich: Beck, 1983 and 1991); Michael Stürmer, *Das ruhelose Reich: Deutschland 1866-1918*, Die Deutschen und ihre Nation 3 (Berlin: Severin & Siedler, 1983); and Heinrich August Winkler, *Der lange Weg nach Westen*, 2 vols. (Munich: Beck, 2000). For a concise overview of the historiographical debate, see Ullmann, *Politik im Deutschen Kaiserreich 1871-1918*, pp. 53-62.

³² On path-dependencies in the historiographical debate, see Richard Evans, "From Hitler to Bismarck: Third Reich and Kaiserreich in Recent Historiography," in *Rethinking German History. Nineteenth-Century Germany and the Origins of the Third Reich* (London: Allen&Unwin, 1987), 55–91; Thomas Nipperdey, "1933 und die Kontinuität in der deutschen Geschichte," in *Nachdenken über die deutsche Geschichte. Essays* (Munich: Beck, 1986), 225–48; and Helmut Walser Smith, "When the Sonderweg debate left us," *German Studies Review* 31, no. 2 (2008): 225–40. On the recent emergence of an alternative trend that wants to treat the nineteenth and twentieth century as separate eras, see Paul Nolte, "Abschied vom 19. Jahrhundert oder Auf der Suche nach einer anderen Moderne," *Geschichte und Gesellschaft. Sonderheft 22 "Wege der Gesellschaft* (2006): 103–32, and the sharp remarks by Niall Ferguson, *The War of the World: Twentieth-Century Conflict and the Descent of the West* (London: Penguin, 2006), p. XII.

³³ See for example Helmut Walser Smith, *The Continuities of German History: Nation, Religion, and Race across the Long Nineteenth Century* (Cambridge: Cambridge University Press, 2008) and the collection of essays in Sven Oliver Müller and Cornelius Torp, eds., *Das Deutsche Kaiserreich in der Kontroverse* (Göttingen: Vandenhoeck & Ruprecht, 2009), in particular their introductory essay "Das Bild des Deutschen Kaiserreichs im Wandel," pp. 9–30 and Helmut Walser Smith's essay "Jenseits der Sonderweg-Debatte," pp. 31–50, which is a revised version of his 2008 article "When the Sonderweg debate left us".

asking whether there was a federal *Sonderweg* that led Germany down a different road than other federal systems, such as the United States or Switzerland. Rather, it means asking – free from teleological perspectives – what influence special systemic features of the federal union had on the government of Germany and what legacy, both structural and political, the federal evolution of the Empire bequeathed to the Weimar Republic and beyond. There is, of course, no point in reading history backwards. This is true for federal evolution as much as for any other topic. Rather, the task is to relate the imperial era to the wider context of how Germany's federal structures evolved in the twentieth century.³⁴

In light of the state of the historiography, this dissertation will attempt a comprehensive narrative of federal evolution that is embedded in the political history of the Empire and that takes the long-term history of modern Germany into account. It may appear surprising that this has never been done before, because this is a topic whose relevance no historian would deny. One reason for this neglect has certainly been the overwhelming body of relevant sources. They comprise the records of every parliament, executive organ, and administrative agency on the national level, in each of the twenty-five states, and on the various subordinated levels of government, most importantly the municipalities. The federal union has thus supplied historians with more documentation than anyone could ever hope to read in one lifetime.

³⁴ Only very few historical works have touched on this issue at all, namely Hans Boldt, "Der Föderalismus in den Reichsverfassungen von 1849 und 1871," in *Die Amerikanische Verfassung und Deutsch-Amerikanisches Verfassungsdenken*, ed. Hermann Wellenreuther and Claudia Schnurmann, Krefelder Historische Symposien: Deutschland und Amerika. Zweites Symposium, veranstaltet in Krefeld 28.-31. Mai 1987 (New York & Oxford: Berg, 1990), 297–333; Wolfram Siemann, *Vom Staatenbund zum Nationalstaat. Deutschland 1806-1871*, Neue Deutsche Geschichte 7 (Munich: Beck, 1995); and Thomas Nipperdey, "Der Föderalismus in der deutschen Geschichte," in *Nachdenken über die deutsche Geschichte. Essays* (Munich: Beck, 1986), 71–131. Some legal historians have considered this problem more comprehensively, but have largely focussed on normative issues. See Peter Bug, "Der Föderalismus im Kaiserreich. Politische Strukturen und Prozesse," in *Föderalismus in Deutschland. Traditionen und gegenwärtige Probleme. Symposium an der Universität Kassel 10. bis 12. April 1991*, ed. Jochen Huhn and Peter-Christian Witt, Schriften zur Innenpolitik und zur kommunalen Wissenschaft und Praxis 8 (Baden-Baden: Nomos, 1992), 55–74; Bodo Dennewitz, *Der Föderalismus. Sein Wesen und seine Geschichte* (Hamburg: Drei Türme, 1947); and Bernd Grzeszick, *Vom Reich zur Bundesstaatsidee. Zur Herausbildung des Föderalismus als Element des modernen deutschen Staatsrechts*, Schriften zum Öffentlichen Recht 705 (Berlin: Duncker & Humblot, 1996). A brief overview has been provided by the journalist Albert Funk, *Kleine Geschichte des Föderalismus: vom Fürstenbund zur Bundesrepublik* (Paderborn: Schöningh, 2010).

It is therefore imperative to define a more narrow focus. This study will look at the Reich rather than the *Länder*. It is a history of federal evolution on the national level, which considers the states only in so far as they participated in the government of the union and as what was going on inside of them was relevant for the whole of Germany. Hence, it draws primarily on sources from national bodies and commentators. Despite the historiographical neglect of federal evolution, these sources have long been rendered accessible, most of them either in print or online. Among others, they include: the protocols of the *Reichstag*,³⁵ the federal law gazette, the *Reichsgesetzblatt*,³⁶ complementary official handbooks, most importantly the *Handbuch für das Deutsche Reich*,³⁷ the most relevant exchange between the highest federal agencies;³⁸ the protocols of the Prussian State Ministry;³⁹ and the correspondence and biographical notes of the most important office holders, such as Bismarck, the major state secretaries, and the key *Bundesrat* plenipotentiaries of the states.⁴⁰

At the heart of this study, however, is the attempt to recover the voices of those sources that historians have so far either neglected or treated with outright contempt. The protocols of the *Bundesrat*, which were not published but distributed to the state governments only, have routinely been denounced as useless.⁴¹ Many historians ‘could hardly imagine a more tight-

³⁵ *Stenographische Berichte (NDB)*, 1867-1870 and *Stenographische Berichte (DR)*, 1871-1918. Available online at a platform provided by the Bayerische Staatsbibliothek, <http://www.reichstagsprotokolle.de/index.html>. For the protocols of the constitutive *Reichstag* of 1867, see Bezold/Holtzendorff, *Materialien*.

³⁶ *RGBl.*, 1871-1918. Available online at Wikisource, [https://de.wikisource.org/wiki/Reichsgesetzblatt_\(Deutschland\)](https://de.wikisource.org/wiki/Reichsgesetzblatt_(Deutschland)).

³⁷ *Handbuch*. Also important are Felix Stoerk, ed., *Handbuch der Deutschen Verfassungen. Die Verfassungsgesetze des Deutschen Reiches und seiner Bundesstaaten nach dem gegenwärtigen Gesetzesstande* (Leipzig: Duncker & Humblot, 1884); Justus Illing, *Handbuch für Preußische Verwaltungsbeamte, des Staates, der Kommunalverbände, der Korporationen und für Geschäftsleute*, 7th ed., 2 vols. (Berlin: Haack, 1898); and Kaiserliches Statistisches Amt, ed. *Statistisches Handbuch für das Deutsche Reich*, 2 vols. (Berlin: Heymann, 1907).

³⁸ Most important is the collection by Goldschmidt, *Kampf*.

³⁹ *Protokolle (PSM)*.

⁴⁰ See for example *Gesammelte Werke*; Martin Friedrich Rudolph von Delbrück, *Lebenserinnerungen von Rudolph von Delbrück, 1817-1867: mit einem Nachtrag aus dem Jahre 1870* (Leipzig: Duncker & Humblot, 1905); and Hugo Lerchenfeld-Köfering, *Erinnerungen und Denkwürdigkeiten: 1843-1925*, 2nd ed. (Berlin: Mittler, 1935).

⁴¹ *Protokolle (DR)*, 1871-1918.

lipped source', because the protocols do not record any debates.⁴² They merely provide lists of attendance, agenda points, and voting results. Moreover, their technical language makes them an incredibly dry read. Yet, none of this prevents them from being informative. On the contrary: if we are to reconstruct the course of federal evolution, the more than fifty volumes of the protocols, each of them several thousand pages strong, are indispensable, as they offer the opportunity to chart the relations between the states and the national level over the whole imperial era. This study will uncover this information by way of a sophisticated statistical analysis, which will shed new light on the debate about the Prussian-federal dualism by providing – for the very first time – solid quantitative evidence for the gradual mediatization of Prussia.

The second viewpoint that this study tries to recover is that of the contemporary constitutional lawyers. Unlike their colleagues from legal history, conventional historians have usually rejected the commentaries of the doctrinal debate as useless, because the positivist approach of the lawyers focussed on legal norms, largely ignored political practice, and used an excessively abstract and complex language.⁴³ This disciplinary bias of historians overlooks the fact that in the absence of a constitutional court the lawyers were the most competent contemporary commentators on the imperial federal state. Their debate is thus an extremely rich source on federal evolution. From their observations, we can infer conclusions about structural problems that might not be reflected in the records of the constitutional actors. In other words, the commentaries of the lawyers are likely to provide the missing links

⁴² ['eine sprödere Quelle läßt sich kaum vorstellen'] Rauh, *Föderalismus*, p. 24.

⁴³ See for example the criticism in Binder, *Reich*, pp. 1-5. As a point of contrast, see the legal-historical studies by Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2, 4 vols. (Munich: Beck, 1992) and by Manfred Friedrich, *Geschichte der deutschen Staatsrechtswissenschaft*, *Schriften zur Verfassungsgeschichte* 50 (Berlin: Duncker & Humblot, 1997), which show how informative the doctrinal debate can be.

that we need to make sense of federal evolution. Each part of this study will therefore keep a close eye on the observations that the constitutional experts made.⁴⁴

Through the lens of these different kinds of sources, this study will focus in particular on the two main problems that drove the evolution of the federal state forward: First, how did the balance between monarchical and parliamentary power that the federal constitution established evolve over time? Did the federal system protect the power of the princes permanently? Or did the *Reichstag* succeed in expanding its powers? And, second, how did the relationship between the Prussian and the federal government develop? Did Prussia maintain a hegemonic status? Or did the Reich come to dominate Prussia? And if so, how did these processes look, when did they occur, and how were they intertwined? By making these issues its guiding questions, this study will illustrate how dynamic the federal union was and how dramatically it changed over time.

In so doing, this study will argue that Bismarck failed in his attempt to secure Prussian dominance and to preserve monarchical power by means of a flexible federal union. The decades after unification were a shining example of the law of unintended consequences: by instrumentalising the Prussian government, the federal administration acquired so many competences and functions over the years that by the outbreak of World War I Germany had practically been transformed into a centralised state. Prussia was no longer independent, the states played close to no role in national decision-making any more, and a fully-fledged federal government under the Chancellor had emerged that the *Reichstag* managed increasingly to hold responsible.

This complete transformation of the German nation state came about because both monarchical and parliamentary actors, above all the Prussian government, the federal administration, and the *Reichstag*, saw federal structures primarily as an instrument of power

⁴⁴ For reasons of space, this dissertation does not include a separate analysis of how the doctrinal debate on the federal state developed among the lawyers. Such an examination of the principal intellectual environment of federal evolution will, however, form the opening chapter of the book that will grow out of the dissertation.

that they tried to manipulate for their own purposes, namely for either the preservation of princely prerogatives or the expansion of parliamentary rights. Federal evolution was therefore driven primarily by power interests, pragmatically pursued, rather than by law and constitutionality. The political process knew no limits in changing, manipulating, or abolishing even the most fundamental federal structures. Political actors and commentators had no respect for federalism as an organisational principle that was beneficial per se, for example because of the advantages of subsidiarity. Rather, they understood – each of them, to be sure, for very different reasons – the federal organisation of Germany as a necessary evil that was little more than a means to an end. This attitude turned out to have a lasting impact on the political culture of Germany, with federal structures remaining at the mercy of power interests in the Weimar Republic and beyond.

This argument will be developed over the course of five chapters, each addressing a specific problem of federal organisation with a distinct methodology. The first two chapters – ‘Unification’ and ‘Constitution’ – will deal with the basic conditions under which the federal state evolved. They will examine the unification process and the design of the constitution through the lens respectively of political caricatures and the debate in the constitutional convention, the constitutive *Reichstag* of 1867.

Then will follow two chapters on ‘Government’ and ‘Participation’, which will scrutinise how the balance of functions and competences between, on the one hand, the federal constitutional organs and, on the other hand, the national level and the states evolved from the adoption of the constitution to the wartime collapse of the monarchy. These chapters will survey the legislative process and the remit of the federal administration and will analyse statistically how the states were involved in federal politics across time. Together, they will provide a comprehensive picture of how federal government evolved over the years.

The last chapter ‘Conflict’ will explore the factors that destabilised the union structurally. By looking at different kinds of constitutional disputes through numerous case studies, it will

identify formal and informal mechanisms of conflict resolution and will examine what impact these had on the course of federal evolution.⁴⁵

Finally, the conclusion will show how both systemically and culturally the experience of the imperial era shaped the evolution of German federal structures through the times of the Weimar Republic, the Nazi dictatorship, and the Federal Republic. Moreover, it will infer some systemic observations from the imperial German case that are relevant for federal orders in general, with a particular eye on the ongoing debate about a reform of the European Union.

So this study is in fact woven from three distinct strands. Combining them permits me to draw connections that would not come into view if I concentrated on just one line of approach. First and foremost, it is a history of the evolution of federal government in Imperial Germany, a history with its own highly revealing dynamic. This main strand of the dissertation is an investigation into subtle systemic changes that pivots on the key question of the political history of Imperial Germany, a question often posed, but never satisfactorily answered: who or what actually governed Germany? The Kaiser or the Chancellor? The Prussian government or the federal bureaucracy? The *Bundesrat* or the *Reichstag*?

As it thus paints a picture of the anatomy of power in the imperial state, this study is also a contribution to one of the biggest debates in modern European history: where, how, and why did Germany go wrong? To this debate on Germany's 'special path', this study adds a perspective that has never been considered before.

Thirdly and lastly, this study offers a systemic analysis of federal structures. The observations it makes about the structural phenomena that occurred in the German federal

⁴⁵ The book that will grow out of this dissertation comprises three additional chapters, which could not be included in the thesis for reasons of space. The book will open with a chapter called 'Environment', which will examine the debate on the federal state among constitutional lawyers (see above fn. 44). The two chapters on 'Government' and 'Participation' will be supplemented by a chapter on 'Monarchy', which will analyse the development of the constitutional position of the Emperor. This chapter will be based on an article that I have written for *German History* and that is attached to this dissertation in the appendix. The thesis will refer to it where relevant (see Notes on the Text). The book will close with a chapter on 'Periphery', which will examine the legal and public discourses about the overseas colonies and Alsace-Lorraine. It will show how the odd structural relationship of these territories to the Reich destabilised the federal union throughout the imperial era.

union – for example in regard to the interrelation between federal organisation and parliamentary rights, between power politics and the spread of decision-making on different levels, or between the individual freedom and structural constraints of political actors – are relevant for federal orders more generally.

In this context, the idiosyncrasy of the imperial German federal state, which lay at the crossroads of monarchical tradition and democratic modernity, makes it a particularly informative case, not least by virtues of the contrasts that can be drawn with other cases. As the eminent German-American public lawyer Karl Loewenstein, who had escaped the centralised terror regime of the Nazis and had found refuge in the federal union of the United States, put it after World War II: ‘Whoever wants to study federalism in its ultimate refinement has to look at Germany, which has practised it for centuries.’⁴⁶ From this perspective, the federal evolution of Imperial Germany is one of these potent historical subjects that can help us not only to understand better key moments of our past, but also – in this light – to comprehend the present and prepare the future.

⁴⁶ [‘Wer den Föderalismus in seinem letzten Raffinement studieren will, muss sich an Deutschland halten, das ihn seit Jahrhunderten praktiziert.’] Quoted in Ines Härtel, ed., *Handbuch Föderalismus. Grundlagen des Föderalismus und der deutsche Bundesstaat*, vol. 1 (Berlin: Springer, 2012), p. 8.

CHAPTER I UNIFICATION

Versailles, 21 January 1871

My darling,

I haven't written to you in too long, forgive me, but this imperial birth was difficult, and kings have in such times the oddest desires, like women before they give to the world what they can't keep anyway. As the accoucheur, I felt more than once the dire need to be a bomb and to explode in order to shatter the whole building into pieces.¹

When she received this note from her husband in late January 1871, Johanna von Bismarck probably paused in bewilderment. Why was Otto so annoyed? He should have been celebrating. The proclamation of the Emperor in Versailles was the climax of his greatest political triumph: the unification of Germany. His lines suggested that there was more to his anger than just his usual depression. Reflecting on what he had endured since he had taken office as Prussian Prime Minister in 1862, Johanna presumably concluded that in the hour of final achievement Otto simply needed to release all his frustration about how difficult it had been to unite the German states.²

What did this process of unification look like? And what impact did it have on Germany's federal order? Historians have told the story of German unification many times. In fact, they had started telling it while the process of unification was still underway. In the public debate about Germany's future and the wars with Denmark, Austria, and France, historians were particularly numerous among the commentators. Most important were the contributions by Heinrich von Treitschke.³ For him and his colleagues of the 'Borussian School' of history writing, unification under Prussian leadership was no less than the fulfilment of German

¹ ['Mein Liebling, ich habe Dir schrecklich lange nicht geschrieben, verzeihe, aber diese Kaisergeburt war eine schwere, und Könige haben in solchen Zeiten ihre wunderlichsten Gelüste, wie Frauen, bevor sie der Welt geben, was sie doch nicht behalten können. Ich hatte als Accoucheur mehrmals das dringende Bedürfnis, eine Bombe zu sein und zu platzen, daß der ganze Bau in Trümmern gegangen wäre.'] Bismarck to his wife Johanna, 21 January 1871, printed in Deuerlein, *Augenzeugenberichte*, p. 308.

² On Bismarck's mood swings during the unification, see Jonathan Steinberg, *Bismarck: A Life* (Oxford: Oxford University Press, 2012), chapter 8 'The Unification of Germany, 1866-70', pp. 258-311.

³ See for example Treitschke's *Die Zukunft der norddeutschen Mittelstaaten* (Berlin: Reimer, 1866), his essay "Der Krieg und die Bundesreform," *Preußische Jahrbücher* 17 (1866): 677-96, and his short manifesto *Was fordern wir von Frankreich?* (Berlin: Reimer, 1870).

history. After the proclamation of the new nation, the Prussian historian Heinrich von Sybel expressed his euphoria:

What have we done to deserve the grace of God in being permitted to experience such great and mighty things? And how will one live afterwards? What had been the object of all wishes and desires for twenty years has now been fulfilled in such an incredibly wonderful way! From where will I now, at my age, be able to derive a new purpose for the rest of life?⁴

When the Empire collapsed in 1918, this teleological perspective became obsolete. Instead, the historiographical debate developed a strong focus on Bismarck. During the Weimar Republic, the Nazi dictatorship, and the first two decades after the Second World War German historians usually portrayed the unification as a product of his ingenious statesmanship. This interpretation was only revised in the 1970s when the historiographical discussion shifted from diplomatic and military questions to social and economic issues. Historians now began to see the unification as a complex process that involved many different domestic and international factors. Manifold structural approaches since have highlighted different aspects of the unification, often revolving around the counterfactual question whether a German nation state could also have been brought about democratically.⁵

In the century and a half over which this historiographical debate has evolved, the federal dimension of the unification has received little attention. Most studies barely mention that the nation state created between 1866 and 1871 was a federal union. There seem to be two main

⁴ [‘Wodurch hat man die Gnade Gottes verdient, so große und mächtige Dinge erleben zu dürfen? Und wie wird man nachher leben? Was zwanzig Jahre der Inhalt alles Wünschens und Strebens gewesen, das ist nun in so unendlich herrlicher Weise erfüllt! Woher soll man in meinen Lebensjahren noch einen neuen Inhalt für das weitere Leben nehmen?'] Printed in Julius Heyderhoff, ed., *Die Sturmjahre der preussisch-deutschen Einigung 1859-1870. Politische Briefe aus dem Nachlass liberaler Parteiführer*, Deutscher Liberalismus im Zeitalter Bismarcks 1 (Bonn: Schroeder, 1925), p. 494. On Sybel's political views on unification, see Hellmut Seier, *Die Staatsidee Heinrich von Sybels in den Wandlungen der Reichsgründungszeit 1862-71*, Historische Studien 383 (Lübeck: Matthiesen, 1961).

⁵ On the development of historiography, see the overviews in John Breuilly, *The Formation of the First German Nation-State, 1800-1871*, Studies in European History (Basingstoke: Macmillan, 1996), pp. 5ff; Elisabeth Fehrenbach, “Die Reichsgründung in der deutschen Geschichtsschreibung,” in *Reichsgründung, 1870-71: Tatsachen, Kontroversen, Interpretationen*, ed. Theodor Schieder and Ernst Deuerlein (Stuttgart: Seewald, 1970), 259–90; Elisabeth Fehrenbach, *Verfassungsstaat und Nationsbildung 1815-1871* (Munich: Oldenbourg, 1992), pp. 113f.; and Ewald Frie, *Das Deutsche Kaiserreich* (Darmstadt: WBG, 2004), pp. 21-31.

reasons for this. On the one hand, the discussion has largely centred on questions of the nation and nationalism, not least because this has given historians a chance to advance their ideological viewpoints in broader political debates. This national focus brings the pan-German features of the unification automatically into view, while pushing those issues aside that were related to the individual states.

On the other hand, the neglect of federal questions is also a consequence of the strict chronological approach that most histories of the unification have adopted. If we concentrate on the sequence of three more or less national wars, the framing of the national constitution, and the proclamation of the German Emperor, it is easy to overlook that the underlying, longer-term problem of unification was federal in nature: how to transform the loose structures of the German Confederation into a more integrated union.⁶

These observations suggest that two things are necessary if we want to understand how the unification process influenced the federal order. First, we have to consider the diverse interests of the various monarchical and parliamentary actors involved from the perspective of the individual states rather than of Germany as a whole. Second, we have to examine the overarching characteristics of the unification process rather than the chronology of events.

The main risk besetting such an analysis is we will wind up reading history backwards. It would be wrong to look at the unification process from the point where it ended, namely from the perspective of the 1871 constitution. The unification was a dynamic process that could at any time have taken a different direction.

One way to correct for teleological bias is to anchor the analysis in contemporary sources that are innocent of later developments. This chapter will do so by looking at the unification through the lens of contemporary caricatures. After the 1848 revolution had ended censorship across the European continent, a rich landscape of political caricatures emerged in Germany and her neighbouring countries. Satirical magazines such as the national-liberal, pro-

⁶ On the centrality of this problem, see Wolfram Siemann, *Vom Staatenbund zum Nationalstaat. Deutschland 1806-1871*, Neue Deutsche Geschichte 7 (München: Beck, 1995), especially pp. 15, 389f.

Bismarckian *Kladderadatsch*, the Bavarian, particularistic *Münchener Punsch*, and the French, republican *Le Charivari* commented on Germany's political transformation in the 1860s and 1870s with much wit. The different perspectives of the caricatures they published can help us greatly in exposing the diverse interests involved in the unification process. Moreover, the irony of political satire makes it much easier to spot the main threads of the unification, which we might otherwise miss in the dense network of events.⁷

On the basis of this approach, this chapter will first expose the four most important structural birthmarks that the unification process left on the federal union: a lack of coordination between the states and the different levels of government; an interdependent relationship between the Prussian and federal government; a general inequality between the states; and a temporary compromise between the monarchical governments and German parliaments. Examining these birthmarks will involve revising several conventional views about the unification. After that, this chapter will demonstrate that the creation of Germany as a federal state lacked any deeper legitimacy. The unification made power rather than law the main principle of the new union.

This analysis will make clear that there was much more to the unification than just the common story of blood and iron. It was a complex process that was driven by the interplay of monarchical and parliamentary actors who tied the transformation of Germany from a loose confederation into a nation state to the problem of what form of government she should adopt.

⁷ An excellent collection of caricatures on the unification has been gathered by the Haus der Bayerischen Geschichte for the 1999 exhibition *Bayern und Preußen. Eine historische Beziehung in Karikaturen*. The exhibition has been moved online and can be retrieved from http://www.hdbg.de/karikatur/de/a_home/a_fr.htm. Arthur Ehrhardt, *Der Junker und der deutsche Traum: die Wiedegründung des Reiches durch Otto von Bismarck* (Leoni am Starnberger See: Druffel, 1959) has considered caricatures, but has composed an apotheosis of Bismarck rather than a critical examination. On the depiction of Franco-German relations in contemporary caricatures, see the historico-cultural study by Michael Siebe, *Von der Revolution zum nationalen Feindbild: Frankreich und Deutschland in der politischen Karikatur des 19. Jahrhunderts: "Kladderadatsch" und "Charivari,"* *Imaginarium* 3 (Münster: Lit, 1995). On political satire in Imperial Germany more generally, see Ann Taylor Allen, *Satire and Society in Wilhelmine Germany: Kladderadatsch & Simplicissimus, 1890-1914* (Lexington, KY: University Press of Kentucky, 1984).

The unification thus established many conditions that shaped the federal evolution of the Empire right until its demise.

Birthmarks

Just after the end of the Austro-Prussian War in late summer 1866, *Kladderadatsch* made a ‘prognosis for the *Reich*’ in the form of a sequence of four images that commented on the past, present, and future of Germany (see Caricature 1). By controlling the German Customs Union, the magazine argued, Prussia had kept the German states on a short leash, preventing any of them from getting closer to Austria. When the states had tried to run away from Prussia after the Confederation collapsed, some into the arms of Austria, the Prussian military got hold of them in the war. Next, the journal predicted, Prussia would tighten her grasp around the northern states by creating a new union. In particular in military terms, the North German Confederation would be so attractive, *Kladderadatsch* forecasted, that the Southern states would eventually want to join it on their own initiative.

This prognosis shows that contemporary observers understood the unification of Germany as a gradual process. For Bismarck, it was a matter of political strategy to pursue a ‘policy of [...] small steps’, as the German historian Thomas Nipperdey has called it.⁸ After their humiliating defeat alongside Austria, the southern states fiercely resisted national unification. It was therefore much easier to consolidate Prussia’s power and security piece by piece and to see German unity as a possible by-product rather than a necessary end-goal to which all strategic decisions had to be subordinated.

At the heart of this pragmatic approach was the idea of solving the constitutional before the national question. This is why in 1866/67 Bismarck criticized the national liberals for acting prematurely when they called for the North and the South to be united right away. As King William of Prussia put it in the speech he read when he opened the constitutive *Reichstag*:

⁸ [‘Politik [...] der kleinen Schritte’] Thomas Nipperdey, *Deutsche Geschichte 1866-1918*, vol. 2: *Machtstaat vor der Demokratie*, 2 vols. (Munich: Beck, 1991), p. 28.

‘Today, the crucial matter is to not miss the advantageous moment for building the house; its expansion we can leave confidently to the future common effort of the German princes and people.’⁹

The priority that the Prussian government assigned to constitutional consolidation over national unification has often been overlooked. Indeed, many historians have claimed that the national state and the constitution were created at the same time and that this simultaneity was one of the main reasons for the democratic deficit of Germany. Too many problems had to be solved at once, they have argued, with the result that the creation of a parliamentary system was impossible without jeopardising unification altogether.¹⁰

Such views misunderstand the real chronological problem of the unification: the federal constitution was adopted four years before the national state was founded. This becomes clear as soon as we consider how the constitution entered into force. It was issued as an ordinary law, the *Law concerning the Constitution of the German Empire* from 16 April 1871, number 628 of the federal law gazette.¹¹ Its character as a piece of federal legislation presupposed that the constitution came into being after Germany had already been founded. Otherwise, neither the two legislative organs that adopted the law – the *Bundesrat* and the *Reichstag* – nor the Emperor who promulgated it could have existed. Moreover, there would have been no law gazette that could have published it.

And indeed it is true that, according to the treaties of unification, the Empire had come into existence already on New Year’s Day 1871. This is why contemporary constitutional lawyers

⁹ [‘Heute kommt es vor Allem darauf an, den günstigen Moment zur Errichtung des Gebäudes nicht zu versäumen; der vollendete Ausbau desselben kann alsdann getrost dem ferneren vereinten Wirken der Deutschen Fürsten und Volksstämme überlassen bleiben.’] King William in the constitutive *Reichstag*, opening session, 24 February 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 73.

¹⁰ See for example Nipperdey, *Deutsche Geschichte 1866-1918*, vol. 2, p. 879. In a federal context, see Holste, *Bundesstaat*, pp. 97ff. In the broader context of German history, see Wolfgang Hardtwig, ‘Der deutsche Weg in die Moderne. Die Gleichzeitigkeit des Ungleichzeitigen als Grundproblem der deutschen Geschichte 1789-1871,’ in *Deutschlands Weg in die Moderne. Politik, Gesellschaft und Kultur im 19. Jahrhundert*, ed. Harm-Hinrich Brandt and Wolfgang Hardtwig (Munich: Beck, 1993), 9–31.

¹¹ *Gesetz, betreffend die Verfassung des Deutschen Reiches*, 16 April 1871, BGBl. NDB (1871), no. 16, pp. 63–85.

saw the treaties as the contractual foundations of Germany.¹² The law of 16 April outlined these foundations with great care. On 15 November 1870, the North German Confederation, Baden, and Hesse created the ‘German Union’.¹³ Bavaria and Wurttemberg acceded to this union in two separate treaties eight and ten days later, respectively.¹⁴ The German nation state was born the day these treaties entered into force, namely on 1 January 1871.

The legal basis for this unification of the northern and southern states was the constitution of the North German Confederation. The German Union of 15 November 1870 adopted it without any great changes.¹⁵ Later, the treaties with Bavaria and Wurttemberg supplemented it by some special rights and interim regulations. When the treaties entered into force, it became binding for the whole of Germany. As a consequence of this expansion of the constitution, all laws that had been adopted by the North German Confederation now became federal laws and, as such, were also introduced in the southern states.¹⁶ Moreover, the new

¹² See in particular Albert Hänel, *Die vertragsmässigen Elemente der deutschen Reichsverfassung*, Studien zum deutschen Staatsrechte 1 (Leipzig: Haessel, 1873). See also Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Vienna: Hölder, 1882), pp. 255ff.; Paul Laband, *Das Staatsrecht des Deutschen Reiches*, vol. 1, 3 vols. (Tübingen: Laupp, 1876), p. 89; Hermann Schulze, *Lehrbuch des Deutschen Staatsrechtes*, vol. 2: Das Deutsche Reichsstaatsrecht, 2 vols. (Leipzig: Breitkopf & Härtel, 1886), pp. 1f.; Meyer, *Lehrbuch des Deutschen Staatsrechts*, 1919, pp. 194-202; and Zorn, *Das Staatsrecht des Deutschen Reiches*, vol. 1, pp. 17-60. Max von Seydel, “Der Bundesstaatsbegriff,” *Zeitschrift für die gesammte Staatswissenschaft* 28 (1872): 185–256, especially pp. 208-42 argued that these contractual foundations implied that Germany was a confederation rather than federation.

¹³ *Protokoll, betreffend die Vereinbarung zwischen dem Norddeutschen Bunde, Baden und Hessen über die Gründung des Deutschen Bundes und Annahme der Bundesverfassung*, 15 November 1870, BGBl. NDB (1870), no. 51, pp. 650-3. Baden and the North German Confederation also concluded a military convention. *Militärkonvention zwischen dem Norddeutschen Bund und Baden*, 25 November 1870, printed in Huber, *Dokumente*, vol. 2, no. 226, pp. 343-6.

¹⁴ *Vertrag, betreffend den Beitritt Bayerns zur Verfassung des Deutschen Bundes, nebst Schlußprotokoll*, 23 November 1870, BGBl. NDB (1871), no. 5, pp. 9-26. *Vertrag zwischen dem Norddeutschen Bunde, Baden und Hessen einerseits und Württemberg andererseits, betreffend den Beitritt Württembergs zur Verfassung des Deutschen Bundes, nebst dazu gehörigem Protokoll*, 25 November 1870, BGBl. NDB (1870), no. 51, pp. 654-65, including the *Militärkonvention zwischen dem Norddeutschen Bunde und Württemberg*, pp. 658ff.

¹⁵ Compare the *Verfassung des Deutschen Bundes*, 31 December 1870, BGBl. NDB (1870), no. 51, pp. 627-49 and the *Publikandum, die Verfassung des Norddeutschen Bundes betreffend*, 26 July 1867, BGBl. NDB (1867), no. 1, pp. 1-23.

¹⁶ For an overview, see Georg Hirth, ed., “Tabellarische Übersicht über die Einführung Norddeutscher Bundesgesetze in Norddeutschland, Bayern, Württemberg, Baden und Hessen,” *Annalen*, 1871, 389–94. As an example for an introductory law, see *Gesetz, betreffend die Einführung Norddeutscher Bundesgesetze in Bayern*, 22 April 1871, RGBl. (1871), no. 17, pp. 87-90.

German constitution replaced the old terms ‘union’ and ‘Federal Presidency’ with names that had a more national connotation: ‘German Empire’ and ‘German Emperor’.¹⁷

All that the law of 16 April 1871 did was to harmonise such measures and to implement the provisions of the unification treaties. In other words, there was no new constitution. Rather, the Empire essentially took over the constitutional charter of the North German Confederation. This meant that the federal order of Germany was born neither when the Empire was founded on 1 January 1871 nor when the constitution was introduced on 16 April of the same year, but when the North German *Reichstag* had adopted the constitution exactly four years earlier, on 16 April 1867.

It is therefore misleading to suggest that the national state and the federal constitution were created at the same time. One could only uphold this assumption if one sees the years between 1867 and 1871 as a dead period in which nothing happened.¹⁸ But this, too, would be wrong. The North German Confederation unfolded dynamic legislative activities in all fields of government. In particular, its social and economic legislation was strikingly progressive. This made the Confederation very attractive to the southern parliaments, which copied many North German laws. At the same time, a common defence system developed in which secret military alliances tied the southern states to the Confederation. In the economic arena too, there were important developments: several reforms to the German Customs Union further intensified the relations between North and South. All of these developments made the four years after 1867 a period of dynamic change.¹⁹ The federal constitution and the national state were

¹⁷ For the debate in the *Reichstag*, see *Stenographische Berichte (NDB)*, 1870, session 10, 9 December, pp. 150f.

¹⁸ For this view, see for example Egmont Zechlin, *Die Reichsgründung*, 3rd ed., Deutsche Geschichte. Ereignisse und Probleme (Frankfurt am Main: Ullstein, 1978), p. 141.

¹⁹ See for example Wolfgang J. Mommsen, *Das Ringen um den nationalen Staat. Die Gründung und der innere Ausbau des Deutschen Reiches unter Otto von Bismarck 1850 bis 1890*, Propyläen Geschichte Deutschlands 7.1 (Berlin: Propyläen, 1995), pp. 197ff., 216f; Klaus Erich Pollmann, *Parlamentarismus im Norddeutschen Bund 1867-1870*, Handbuch der Geschichte des deutschen Parlamentarismus (Düsseldorf: Droste, 1985); and Rolf Wilhelm, *Das Verhältnis der süddeutschen Staaten zum Norddeutschen Bund (1867-1870)*, Historische Studien 431 (Husum: Matthiesen, 1978), a study that looks in particular on the indirect ways by which the southern states were integrated into the North German Confederation. For a contemporary view on the great changes in this period, see Karl von Hofmann, *Vom norddeutschen Bund ins deutsche Reich*:

therefore not just created at different times, but also under very different political circumstances.

This asynchronicity had an impact on the German federal union that was in many ways highly problematic. First of all, it made the time-frame of federal evolution quite paradoxical. The federal order began to evolve before the Empire had been founded, namely in April 1867. For this reason, a discussion of the constitutional principles that governed Germany must look at the negotiations of the constitutional assembly of 1867 rather than at the proceedings of its 1871 counterpart. The first constitutive *Reichstag* made a number of important amendments to the constitutional draft that Bismarck and the monarchical governments had proposed. The second made no relevant changes and adopted the law of 16 April 1871 without much ado.

Moreover, the fact that the national state and constitution were not created at the same time contributed greatly to the ambiguity of Germany's federal structures. One of the most important reasons why they were so complicated was that they had been the product of two compromises at two different stages of the unification process: first between the monarchical governments and the constitutive *Reichstag* in spring 1867; and then between the governments of the North German Confederation and the southern states in autumn 1870.²⁰

It was another problem when and how to introduce the laws of the Confederation into the South. This touched not only on questions of government, but also on practical issues that influenced the life of citizens directly, such as the legal regulation of marriage. In the first few years after unification, the introduction of North German laws was thus a subject that kept Bismarck and the evolving federal administration very busy.²¹

Gesandtschaftsberichte und Briefe des grossherzoglich hessischen Gesandten Karl Hofmann aus Berlin, 1866-1872, ed. Frank Zimmer, Arbeiten der Hessischen Historischen Kommission 16 (Darmstadt: Hessischen Historische Kommission, 2001).

²⁰ See Hermann-Josef Blanke, *Deutsche Verfassungen. Dokumente zu Vergangenheit und Gegenwart* (Paderborn: Schöningh, 2003), p. 33.

²¹ See Bismarck's report to Emperor William, 20 April 1871, and his letter to the Prussian minister of War Albrecht von Roon, 3 February 1873, printed in *Gesammelte Werke*, vol. 1, no. 64 and 391, pp. 67-70, 460f.

Most problematic of all was the fact that the federal constitution did not entirely fit the political needs of the Empire, because it had been taken over from another state. In 1870/71, a state was created for a constitution rather than vice versa. By admitting the southern states to the union, the unification treaties squeezed twenty-five states into a constitutional order that had been designed for only twenty-one. Complex constructions such as the Bavarian and Wurttemberg special rights were evidence that the federal constitution was not made to measure for the new polity. The North German Confederation had to balance the interests of Prussia and twenty more or less small principalities. Once united, the challenge for Germany was even greater. Four additional states – the two grand duchies of Hesse and Baden and the two relatively powerful kingdoms of Bavaria and Wurttemberg – further complicated the federal fabric. In order to provide a solid legal framework for the union, then, the creation of the national state would have needed to go hand in hand with the framing of a new constitution. As it did not, one of the most important birthmarks of the federal state was a lack of constitutional coordination between the states and the different levels of government.

This was all the more problematic in light of the extreme dominance of Prussia. The unification excluded Austria from Germany, created a lesser-German federal state, and made Prussia its undisputable hegemon. Most historiographical accounts hold that there was no alternative to this development, that it simply reflected the balance of power among the constituent entities.²² However, before the defeat of Austria in 1866 it was far from clear that Germany would assume the shape of a Prussian-dominated federation rather than of a reformed greater-German confederation, in which Prussia and Austria would continue to face each other.²³

²² The latest work to advance this view is Klaus-Jürgen Bremm, *1866: Bismarcks Krieg gegen die Habsburger* (Darmstadt: Theiss, 2016), see especially pp. 272-81. For an overview on this historiographical perspective, see Frie, *Das Deutsche Kaiserreich*, pp. 21ff.

²³ On the role of contingency and possible alternatives to the lesser-German unification, see Breuilly, *The Formation of the First German Nation-State, 1800-1871*, especially the closing reflections 'Results'.

To this, one might object that after the 1848 revolution the German Confederation had demonstrated that a solution of the German national question that included both great powers could never have worked. And indeed it is true that the conflicting interests of Prussia and Austria left the Confederation in a state of paralysis for much of the 1850s and 1860s. None of the many reform proposals that aimed to transform the Confederation into a more integrated union ever came close to political implementation. The discussion ranged from a variety of models that wanted to divide the leadership of the Confederation between Austria and Prussia to concepts that proposed to establish the middling states as a third column that could moderate between the great powers.²⁴ In the end, all such proposals failed because Berlin rejected them categorically. Most spectacular was the failure of the *Fürstentag* in 1863. To this congress in Frankfurt the Habsburg Kaiser had invited all German princes in order to agree on a reform of the Confederation. The Prussian king, however, simply did not come, even though he was passing through Frankfurt on his way home from taking the waters in Baden-Baden.²⁵

But this paralysis of the German Confederation did not imply that the idea of a greater-German ‘confederate nation’ had failed in general. To the contrary: the Confederation had made great progress in terms of practical reforms that could have been the basis for a ‘confederate nationalism’. Most importantly, the Confederation had succeeded to a great extent in standardising the German legal landscape. The climax of this gradual unification of law was the adoption of the General German Commercial Code in 1861, the first comprehensive commercial code applicable to the whole of Germany.²⁶ Moreover, in the 1860s the thirty-five states of the Confederation got better and better at formulating their

²⁴ On the various reform proposals, see Jürgen Müller, *Deutscher Bund und deutsche Nation. 1848-1866* (Göttingen: Vandenhoeck & Ruprecht, 2005), pp. 276-360.

²⁵ On the Frankfurt *Fürstentag*, see Norbert Wehner, *Die deutschen Mittelstaaten auf dem Frankfurter Fürstentag 1863*, Europäische Hochschulschriften. Reihe 3, Geschichte und ihre Hilfswissenschaften 548 (Frankfurt am Main: Lang, 1993) and Kurt Dorien, *Der Bericht des Herzogs Ernst II. von Koburg über den Frankfurter Fürstentag 1863: ein Beitrag zur Kritik seiner Memoiren*, Historische Bibliothek 21 (Munich and Berlin: Oldenbourg, 1910).

²⁶ [‘föderative Nation’], [‘föderativer Nationalismus’] Müller, *Deutscher Bund und deutsche Nation. 1848-1866*, p. 24. On the standardisation of laws, see *ibid.*, pp. 391ff.

individual policies in harmony with rather than against the growing German national identity.²⁷

From this perspective, the collapse of the Confederation and the creation of a Prussian-dominated federation was not a ‘natural’ evolution. Rather, the unification was a ‘disruption of history’, as the distinguished historian of German nationalism Dieter Langewiesche has called it, because it did not continue the loose greater-German tradition that had shaped Germany since the Holy Roman Empire.²⁸

The extent of this disruption becomes clear when we consider the nature of the 1866 war. The traditional characterisation of this conflict as an ‘Austro-Prussian War’ is a euphemism.²⁹ On the battlefield, two coalitions of German states faced each other, eighteen under Prussian and eleven under joint Austrian and Bavarian command. When the fighting was over, the peace excluded several million German speakers from becoming a part of the new German nation state. The Austro-Prussian War was therefore in reality a civil war.³⁰ This is why contemporaries called it ‘Bruderkrieg’, a war amongst brothers.³¹ Already in 1865, *Kladderadatsch* had realised that a military conflict between the great powers would probably draw the whole of Germany into a civil war. For the satire magazine, the fight for supremacy in Germany was like a pistol duel between Austria and Prussia, in which the bullets would hit the other states sooner or later (see Caricature 2).

If the 1866 war was a civil war, then the unification started with a partition. A hundred years later, when the Berlin Wall divided Germany into a western and eastern part, Thomas Nipperdey called the exclusion of Austria from Germany ‘the first modern partition of the

²⁷ See Abigail Green, *Fatherlands. State-Building and Nationhood in Nineteenth-Century Germany* (Cambridge: Cambridge University Press, 2001).

²⁸ [‘Geschichtsbruch’] Dieter Langewiesche, “Was heißt ‘Erfindung der Nation’? Nationalgeschichte als Artefakt - oder Geschichtsdeutung als Machtkampf,” *HZ* 277 (2003), p. 612. On this issue, see also Langewiesche’s book *Nation, Nationalismus, Nationalstaat: in Deutschland und Europa* (Beck, 2000), especially chapter 3 ‘Föderativer Nationalismus als Erbe der deutschen Reichsnation. Über Föderalismus und Zentralismus in der deutschen Nationalgeschichte’.

²⁹ For an example, see Geoffrey Wawro, *The Austro-Prussian War: Austria’s War with Prussia and Italy in 1866* (Cambridge: Cambridge University Press, 1996).

³⁰ Niall Ferguson, *Civilization* (London: Penguin, 2012), p. 214.

³¹ See for example Treitschke, “Der Krieg und die Bundesreform”, p. 388.

nation'.³² This was a rough start for a process that intended to unite the German states, because it alienated all those who had fought on the side of Austria rather than Prussia.

Moreover, the exclusion of Austria made Prussia overwhelmingly strong in the new national union. The prospect of establishing this dominance was the driving factor behind the unification policy of the Prussian government. Bismarck was clear about this motivation as early as 1853:

Our policy takes place on no other parade ground but Germany [...], a ground to which Austria too lays claim. [...] We are sucking away the air from each other's mouths, one has to give way or the other will make him give way.³³

In order to preserve the power of the Prussian monarchy, so Bismarck believed, it had to become the hegemon of a German federal state. The unification was therefore not a process in which the different states came together in order to form a union on equal terms, but a process in which the strongest amongst them merged them to its own advantage. The French magazine *Le Charivari* illustrated this with reference to one of the greatest works of German drama. From the journal's point of view, Prussia was a 'new Faust' that ushered the innocent German Gretchen into the national house, while Bismarck, the Prussian Mephistopheles, kept the greater-German doctrine at bay (see Caricature 3).

To understand what this dominance of a single state meant for the union of twenty-five states we have to move our perspective from Prussia to that of the middling and small states. As soon as Austria was excluded from Germany, the governments of the small principalities and minor kingdoms could no longer resort to the strategy that had proven most effective in defending their independence in the Confederation: playing the great powers off against each

³² ['die erste moderne Teilung der Nation'] Thomas Nipperdey, *Deutsche Geschichte 1800-1866*, vol. 1: Bürgerwelt und starker Staat, 2 vols. (Munich: Beck, 1983), p. 791.

³³ ['Unsere Politik hat keinen anderen Exerzierplatz als Deutschland [...] und gerade diesen glaubt Österreich auch für sich zu gebrauchen. [...] Wir atmen einer dem anderen die Luft vor dem Munde fort, einer muss weichen oder vom anderen gewichen werden.'] Quoted in *ibid.*, p. 685.

other, often by seeking the support of outside powers.³⁴ Before 1866, the middling and small states had always been able to play the ‘Tri-Ace’ in the poker game of German politics, as *Kladderadatsch* put it (see Caricature 4). With Prussia now being the only remaining great power in the union, it was impossible for them to pursue this kind of triangular policy. A ‘Third Germany’ that manoeuvred between two great powers no longer existed. The tripartite structure of Germany had changed into a constellation in which Prussia faced all the rest. Given Prussia’s overwhelming dominance in terms of population, territory, and economic, financial, and military capabilities, this left the middling and small states with little chance to remain independent factors in German politics. The princes were well aware of this dilemma. During the ceremonial dinner after the proclamation of the Emperor in Versailles, the young prince of the tiny Thuringian state Schwarzburg-Rudolstadt addressed the assembled royal personage with the words: ‘Greetings to you, fellow vassals!’³⁵

The key problem was that without Austria, a national government that was independent of Prussia could not exist. There was no other option for the government of the union than to rely mainly on Prussian staff, money, and troops. In the long run, the crucial question would thus be whether the Prussians would manage to control the federal government or vice versa. In other words, it was one of the most important birthmarks of the imperial union that the links between the Prussian and federal government were so close that the fate of the whole union depended on how their relationship would evolve.

So great was the superiority of Prussia over the other states that to many contemporary observers it seemed perfectly clear that the unification created a Prussian rather than German Empire. In 1870, the Viennese magazine *Kikeriki* depicted ‘Germany’s future’ as a spiked helmet that Prussia would impose on all German people (see Caricature 5). One year later,

³⁴ On this strategy, see for example Brendan Simms, *The Struggle for Mastery in Germany, 1779-1850*, European History in Perspective (Basingstoke: Macmillan, 1998), pp. 105-17, especially pp. 110f. and Wolfram Siemann, *Vom Staatenbund zum Nationalstaat. Deutschland 1806-1871*, Neue Deutsche Geschichte 7 (München: Beck, 1995), pp. 393f., where he examines the ‘Triaspolitik’ of the middling states in the context of the failure of the Erfurt Union.

³⁵ Cited in Steinberg, *Bismarck*, p. 308.

after the French defeat in the Franco-Prussian War, *Le Charivari* adopted a similar perspective when it published a new Prussian crest. The eagle of the Hohenzollern, carrying the reparations and the bloody sword of the war in his claws, now featured the wings of a bat, which represented the other German states (see Caricature 6).

But the hegemonic character of the federal union was only one of many structural imbalances that the unification produced. Among the middling and small states, the unification did not establish perfect equality either. The biggest losers of the unification were Hanover, Nassau, Hesse-Kassel, and the Free City of Frankfurt. They lost their independence altogether. Although each of them had been a sovereign entity since the Vienna Congress, Prussia annexed them without further ado when they sided with Austria in the war of 1866. In an exercise of power politics, the Prussian Gulliver simply erased these dwarfs from the German map, as *Le Charivari* observed (see Caricature 7).

The differences in the status of the other states originated mainly in the negotiations between the governments of the North German Confederation and the southern states in autumn 1870.³⁶ The two southern kingdoms, Bavaria and Wurttemberg, firmly insisted on their formal supremacy over the grand duchies, duchies, and other principalities of Germany. For this reason, they made their accession to the union dependent on the granting of prerogatives. As Bismarck wanted them to join on their own initiative, he was ready to rearrange the federal framework of the union like a coat that had to be tailored to their needs, as *Kladderadatsch* complained (see Caricature 8).

The unification treaties thus established a wide variety of special rights. Each of the kingdoms received a permanent seat in certain committees of the *Bundesrat*. Bavaria was granted the presidency over the committee on foreign relations. Unlike the other princes, the Bavarian king retained the command of his regiments during peace time. Various other

³⁶ On this topic, see Karl Bosl, "Die Verhandlungen über den Eintritt der süddeutschen Staaten in den Norddeutschen Bund und die Entstehung der Reichsverfassung," in *Reichsgründung, 1870-71: Tatsachen, Kontroversen, Interpretationen*, ed. Theodor Schieder and Ernst Deuerlein (Stuttgart: Seewald, 1970), 148–63.

special rights guaranteed some of the states authority in economic matters that otherwise fell within the remit of the national government, such as the taxation of beer and wine or the administration of railways, telegraph systems, and postal services.³⁷ This plethora of individual prerogatives implied that in addition to a federal hegemon the constitution also established second- and third-class states. A further birthmark that the unification left on the federal union was therefore a general inequality between the states.

In an environment obsessed with issues of status and prestige, this was political dynamite. This problem had become obvious even before the ink under the unification treaties was dry. During the negotiations in Versailles, Bavaria's demands were so extensive that the success of the unification was in jeopardy. Bismarck came down with gallbladder problems and the Bavarian delegation threatened to leave Versailles several times.³⁸ Only after Hesse, Baden, and Wurttemberg had signed the treaties did the threat of political isolation make the Bavarian government more cooperative. The conflict was finally resolved when both parties agreed on a deal: Bismarck accepted a comprehensive list of special rights for Bavaria, while the Bavarian government gave its consent to the Prussian king receiving the title of German Emperor.³⁹

Still, this deal was only successful because it involved bribery. Ludwig II of Bavaria vehemently opposed the plan to make the Prussian king Emperor. For him, it was terrible to imagine that the Hohenzollern dynasty could ever be higher in rank than the House of Wittelsbach. But as he was always in need of money for building his fairy-tale castles, most famously Neuschwanstein, it was easy for Bismarck to persuade him. It is an irony of history that the money for this bribe came from the expropriation of another ancient German dynasty.

³⁷ For a good overview of the special rights, see Huber, *Verfassungsgeschichte*, vol. 3, pp. 806-8.

³⁸ See the letter by the Baden prime minister Julius Jolly to his wife, 17 November 1870, printed in Deuerlein, *Augenzeugenberichte*, p. 216.

³⁹ See the documents printed in *ibid.*, pp. 196-202 and also the earlier report of the Bavarian envoy Graf von Berchem to the foreign minister Graf von Bray-Steinburg, 14 October 1870, pp. 232f.

Bismarck generated the necessary funds from the assets of the House of Guelph, which he had confiscated when Prussia had annexed Hannover in 1866.⁴⁰

Such episodes made the unification a bizarre mix of princely theatre and serious political conflict. This became perhaps most evident when the Wurttemberg government decided to postpone the ratification of the unification treaty at the last minute. A court intrigue had moved King Karl I to suddenly insist that his kingdom would only join the union if it received as many special rights as Bavaria.⁴¹ As absurd as Karl's and Ludwig's behaviour may seem today, it does point to the core problem of the inequality between the states. Since all special rights were totally insignificant when compared to the Prussian hegemony, their existence had more to do with political psychology than with real power.

The state where this was most obvious was Bavaria. Opposition to the Prussian-dominated unification was widespread there. In the 1869 elections to the parliament of the German Customs Union, the parties that defended Bavarian independence celebrated a landslide victory. This was a clear signal to the Bavarian government that it would be unable to overcome the local scepticism against unification, unless it came home from Versailles with far-reaching special rights. While this strategy worked out in the autumn and winter of 1870, the disappointment was great when the hard-won prerogatives soon turned out to be meaningless. Already in April 1871, Bismarck made clear that in the peace talks with France, Bavaria's 'participation will have to remain – to cut the matter short – more ornamental, in order to satisfy a point of honour'.⁴² In the following months, it became clearer and clearer that Prussia's dominance in the *Bundesrat* and the federal administration made most special rights worthless. The committee of foreign affairs over which Bavaria presided was the best

⁴⁰ See Lothar Gall, *Bismarck. Der weisse Revolutionär*, 2nd ed. (Frankfurt am Main: Propyläen, 2002), pp. 517f. See also the documents in Deuerlein, *Augenzeugenberichte*, pp. 254ff.

⁴¹ See Bosl, "Die Verhandlungen über den Eintritt der süddeutschen Staaten in den Norddeutschen Bund und die Entstehung der Reichsverfassung", p. 160.

⁴² ['Betheiligung wird, um es kurz auszudrücken, eine mehr ornamentale zu bleiben haben, zur Befriedigung eines Ehrenpunctes'] Bismarck to the Prussian envoy in Brussels, 22 April 1871, printed in *Gesammelte Werke*, vol. 1, no. 68, p. 74.

example. It did not convene a single time, because the Chancellor took all diplomatic matters in his own hands. Bismarck even denied Bavarian envoys the right to represent the Empire at foreign courts when the imperial ambassador was absent. As early as June 1871, he called this prerogative a purely ‘honorary right’ that had no practical effect.⁴³

Such humiliations spread the feeling in Bavaria that the kingdom had been deceived and manipulated. For many, the German national state turned out to be an expansion of the Prussian military monarchy that robbed the states of their independence. The Bavarian satirical magazine *Die Bremse* expected in 1874 that the Prussian snake would soon devour even the last remaining special rights of Bavaria (see Caricature 9). In the opinion of the journal, the kingdom had become so weak that the proud Bavarian lion, a veteran of the unification wars, was now in chains (see Caricature 10). From this point of view, the fears had become true which the leader of the Party of Bavarian Patriots, Edmund Jörg, had voiced in the Bavarian parliament just before the vote on the ratification of the unification treaties:

If we manage [...] to avert disaster in the last moment and to save the free, legitimate existence of Bavaria within the German nation, then, Gentlemen, we have done a great work [...]. But if we do not manage, the free and legitimate independence and existence of Bavaria within the German nation must perish.⁴⁴

Opinions such as this point out that for the middling and small states, one of the main concerns about unification was whether they would be able to organise most of their affairs on their own and to participate in federal decision-making independently. The general inequality between them made this very unlikely, because it weakened them vis-à-vis the federal hegemon Prussia even further.

⁴³ [‘Ehrenrecht’] Bismarck to the Prussian ambassador in London von Bernstorff, 22 June 1871, printed in *ibid.*, no. 138, p. 143. It became practice that lower-ranking officials from the Foreign Office rather than Bavarian diplomats took the place of the ambassador when he was unavailable.

⁴⁴ [‘Gelingt es uns [...] im letzten Augenblick noch das Unheil abzuwenden und die freie, berechnigte Staatsexistenz Bayerns innerhalb der deutschen Nation zu retten, dann, meine Herren, haben wir ein Werk getan [...]. Gelingt es uns aber nicht, muß die freie, berechnigte Selbständigkeit und Staatsexistenz Bayerns innerhalb der deutschen Nation untergehen.’] Edmund Jörg in the Bavarian House of Representatives, 21 January 1871, printed in Deuerlein, *Augenzeugenberichte*, p. 276.

Another feature of the unification process that greatly shaped federal structures was its allegedly undemocratic character. Historians have usually argued that the governments rather than the people founded the Empire. Unlike the unsuccessful attempt in 1848, they maintain, the unification of 1871 was not an act of popular, but of monarchical sovereignty. In other words, the unification was a revolution from ‘above’ rather than from ‘below’. As evidence for this interpretation, it has often been cited that in 1848 the prime mover of the unification was a national constitutional assembly, while in 1870/71 a series of intergovernmental negotiations stood in the centre of action.⁴⁵

This view of the democratic dimension of the unification process is simplistic. It, too, rests on the wrong assumption that the national state and the federal constitution were created at the same time. If we confine our view to the negotiations of the unification treaties in autumn 1870, it appears indeed as if the officials of the state governments were the only decision-makers. The delegation of the *Reichstag* entered the scene only at the very end in order to offer the Prussian king the imperial crown after the princes had already done so.⁴⁶ If we broaden our perspective to the whole period between 1866 and 1871, however, we realise that in every step and on all of levels of government the federal constitution was adopted with parliamentary consent.⁴⁷

The constitutive *Reichstag* of 1866/67 was no constitutional assembly in the conventional sense, because it did not frame the constitution. The original proposal was drafted by

⁴⁵ On the controversy about the unification as a revolution from ‘above’ or ‘below’, see Hagen Schulze, *The Course of German Nationalism: From Frederick the Great to Bismarck, 1763-1867* (Cambridge: Cambridge University Press, 1991), pp. 97-101.

⁴⁶ Mommsen, *Das Ringen um den nationalen Staat. Die Gründung und der innere Ausbau des Deutschen Reiches unter Otto von Bismarck 1850 bis 1890*, pp. 253ff..

⁴⁷ For a similar view, see Ernst Rudolf Huber, “Die Bismarcksche Reichsverfassung im Zusammenhang der deutschen Verfassungsgeschichte,” in *Moderne deutsche Verfassungsgeschichte (1815-1914)*, ed. Ernst-Wolfgang Böckenförde, 2nd ed., Neue Wissenschaftliche Bibliothek Geschichte 51 (Königsstein: Athenäum, 1981), 171–207, where he speaks of an ‘agreed constitution’ [‘vereinbarte Verfassung’], p. 173. See also his essay “Bismarck und der Verfassungsstaat,” in *Nationalstaat und Verfassungsstaat. Studien zur Geschichte der modernen Staatsidee* (Stuttgart: Kohlhammer, 1965), 188–223, especially p. 202 and vol. 3 of his *Verfassungsgeschichte*, pp. 773-80. Schulze, *The Course of German Nationalism*, pp. 97-101 embraces more or less the same view, characterising the unification as a ‘team-game between Bismarck and the nationalist movement’, p. 100.

Bismarck, either in a creative outburst of one night, as legend has it, or, more likely, with the help of several officials from the Prussian Ministry of Commerce.⁴⁸ After the governments of the North German states had accepted the draft, they presented it to the *Reichstag* for review and approval. This gave the newly elected national parliament a legitimising function. Moreover, the *Reichstag* had the power to propose amendments that the united governments needed to approve. This gave the parliamentarians real political power that became manifest in how drastically they changed the original draft. The most important amendment, the so-called *Lex Bennigsen*, did nothing less – as we will see in the next chapter – than redefine the role of the Chancellor in federal government.

In 1870/71, the *Reichstag* did not assume such a prominent role. The reason was simply that what happened was not the creation of a new constitution, but the admission of four additional states to the already existing union of the North. Still, the federal parliament approved both the constitution – now for a second time – and the unification treaties when it adopted the *Law concerning the Constitution of the German Empire* on 16 April.

On the national level, then, the unification process was democratically legitimised in 1867 as well as in 1871. *Kladderadatsch* highlighted the importance of the constitutive *Reichstag* in a caricature that addressed the distrust of the French Emperor Napoleon III towards the emerging German union at the time when the parliament negotiated the federal constitution (see Caricature 11). The caricaturist depicted the North German states, represented by their heraldic animals, as prisoners in a cage that was based on the fundament of a common parliament.

Parliamentary consent to the unification was not limited to the national level alone. In each of the twenty-five states, a *Landtag* – most often composed of a democratically elected lower house and an aristocratic upper house – approved either the federal constitution of 1867 or the

⁴⁸ See Walter Bußmann, “Bismarck: Seine Helfer und seine Gegner,” in *Reichsgründung, 1870-71: Tatsachen, Kontroversen, Interpretationen*, ed. Theodor Schieder and Ernst Deuerlein (Stuttgart: Seewald, 1970), pp. 129f. and the detailed study by Otto Becker, *Bismarcks Ringen um Deutschlands Gestaltung*, ed. Alexander Scharff (Heidelberg: Quelle & Meyer, 1958), part 3 ‘Das Keimen der deutschen Verfassung’, pp. 211-89.

unification treaties of 1870, depending on when the state joined the union. This was the main reason for why it took so long for the unification process to be completed after the monarchical governments had agreed on the treaties in November 1870. The Bavarian House of Representatives gave its approval as late as 21 January 1871, three weeks after the Empire had legally come into existence. This retarding effect of the parliaments on unification was often subject to public criticism. In March 1869, for example, the *Kladderdatsch* complained that in trying to find a solution to the German national question the Prussian chambers, the parliament of the Customs Union, and the North German Reichstag were like riders on a carousel – they constantly went round in circles and got nowhere (see Caricature 12).

If we consider this parliamentary consent to the unification on both the national and the state levels, we can no longer speak of the constitution as an imposed charter. However, the extent to which it really was a consensual agreement between the monarchical governments and the people depended on how much scope of action the parliaments actually had. Would it have been possible for them to reject the constitutional draft or the unification treaties? And, if so, what would have happened?

The state parliaments, it seems, could hardly have said no. In 1867, they were under intense pressure because they voted on the constitution only after the united governments and the *Reichstag* had already agreed on it. In 1870/71, too, the state parliaments did not really have a choice, as the Bavarian case illustrates. The particularistic parties in the House of Representatives managed to delay the vote on the unification treaties for some time. But as soon as the other southern parliaments had given their approval, the threat of political isolation became so great that the majority of Bavarian parliamentarians gave up resistance. Only if they had cooperated could the southern parliaments have hoped to prevent unification. But this was totally unrealistic as the great majority of MPs in the lower chambers of Baden and Hesse were eager to join the union – the former because of strong national sentiments, the latter because of a basic interest in uniting the North and South German parts of Hesse.

Chances were much better for the *Reichstag*. On the national level, it enjoyed a monopoly of popular representation that gave the parliamentarians at least some leverage. At the same time, however, the national enthusiasm after the military victories against Austria and France put a lot of pressure on the MPs to adopt the constitution. From this perspective, the constitutive *Reichstag* of 1867 probably made most of its possibilities when it pushed through several important amendments.

This seems all the more true if we consider that in the event of a parliamentary rejection Bismarck had already prepared a secret treaty between the governments of Prussia, Saxony, Saxe-Weimar-Eisenach, and Hesse-Darmstadt that would have imposed the constitution on the states in the form of an international treaty.⁴⁹ The consent of the *Reichstag* was thus *not* a constitutive element of the unification. Nevertheless, it was politically important. Otherwise, the strategy to impose the constitution by an international treaty would have been plan A rather than B. For Bismarck, the search for parliamentary consent was crucial to overcoming the different interests of the state governments. As he put it in a letter to the Prussian envoy in St Petersburg in April 1866, ‘one cannot hope [...] that the governments will agree without the participation of a national parliament’.⁵⁰

In order to gain parliamentary consent, then, Bismarck enshrined into the constitutional draft a peculiar balance of monarchical and parliamentary power that the amendments of the constitutive *Reichstag* further refined. The federal constitution was therefore a compromise between the monarchical governments and the German parliaments. This character of the constitution was one of the most important birthmarks of the union, because it made federal evolution dependent on how long the compromise that had been reached between 1866 and 1871 would last.

⁴⁹ See Huber, *Verfassungsgeschichte*, vol. 3, pp. 654f., in particular fn. 27.

⁵⁰ [‘Auf Einigung der Regierungen darüber ohne die Mitwirkung einer Vertretung der Nation ist [...] nicht zu hoffen.’] Bismarck to the Prussian envoy in St Petersburg Graf von Redern, 17 April 1866, cited in Holste, *Bundesstaat*, p. 98.

Legitimacy

We have seen that the unification process imposed certain structural features that would shape the subsequent evolution of the federal order. But if we want to fully understand what impact the events and decisions of the unification era had on Germany's future, we also need to address the legitimacy of that order. What was the legitimacy of the federal organisation of the Empire made of? And how did the character of this legitimacy shape the further development of the federal state?

The foundation of a federal union could not draw on any distinct historical legitimacy. To the contrary: the unification process deliberately broke with the tradition of a greater-German, confederate order that had shaped Germany since the Holy Roman Empire.⁵¹ *Le Charivari* made this clear to its readers already shortly after the Austro-Prussian War had broken out. Bismarck's unification policy, the magazine argued, had smashed the porcelain of Germany's confederate tradition on the floor of history (see Caricature 13).

The creation of the imperial crown did not establish any historical legitimacy either.⁵² Except for a few nostalgists, no one seriously claimed that the new German Emperor was in any way linked to his Holy Roman counterpart.⁵³ The Bavarian lawyer Joseph von Held described this general opinion with the help of a biblical metaphor: 'It is as untenable to claim that a remnant of old times has been re-inaugurated, as it is to maintain that new wine has

⁵¹ On this point, see Hans Boldt's essay on the occasion of the conference Historikergespräch Österreich - Bundesrepublik Deutschland 1989 "Der Föderalismus in den Reichsverfassungen von 1849 und 1871," in *Die Amerikanische Verfassung und Deutsch-Amerikanisches Verfassungsdenken*, ed. Hermann Wellenreuther and Claudia Schnurmann, Krefelder Historische Symposien: Deutschland und Amerika. Zweites Symposium, veranstaltet in Krefeld 28.-31. Mai 1987 (New York & Oxford: Berg, 1990), p. 31f.

⁵² On the legitimacy of the imperial crown more generally, see Elisabeth Fehrenbach, *Wandlungen des Deutschen Kaisergedankens 1871-1918*, Studien zur Geschichte des neunzehnten Jahrhunderts 1 (Munich: Oldenbourg, 1969).

⁵³ For an example of this outsider perspective, see for example Albert von Ruville, *Das Deutsche Reich ein monarchischer Einheitsstaat. Beweis für den staatsrechtlichen Zusammenhang zwischen altem und neuem Reich* (Berlin: Guttentag, 1894).

been put into old wineskins.’⁵⁴ Although the proclamation of the Emperor in Versailles spoke of the ‘recreation of the German Empire’, neither Bismarck nor the monarchical governments, parliamentarians, or the wider public were interested in historical continuities with the old Empire, whose structural weaknesses were seen as having rendered Germany subject to permanent foreign interference and domestic strife.⁵⁵ When the *Reichstag* approved the unification treaties in December 1870, the liberal MP Carl von Säger summarised the emotions behind this view:

And now, Gentlemen, this new German Empire, it is certainly no imitation of the old Holy Roman Empire – that was a sad conglomerate of conflicting forces – the new Empire has grown out of the soil of the general patriotic sentiment that has moved Germany’s princes and people alike and that is documented in splendid feats of arms in a manner that has never been before in German history.⁵⁶

In a public lecture, Heinrich Geffcken, law professor in Rostock, illustrated this general rejection of a Holy Roman tradition with the help of a rhetorical question: ‘And this mummy we are said to have raised from the dead to new artificial life by the hard work of more than sixty years of fighting for unification?’⁵⁷

Even if it did not refer to any historical predecessor, the establishment of the imperial crown suggested that monarchical sovereignty was a legitimising principle of the new union. Upon closer inspection, however, it becomes obvious that the unification did more to

⁵⁴ [‘Wie wenig man sagen kann, ein Ueberbleibsel vergangener Zeiten sei wieder inaugurirt worden, so wenig könnte man behaupten, neuer Wein sei in alte Schläuche gegossen.’] Josef von Held, *Das Kaiserthum als Rechtsbegriff* (Würzburg: Thein, 1879), p. 36.

⁵⁵ [‘Wiederherstellung des Deutschen Reiches’] Proclamation of the German Emperor in Versailles, 18 January 1871, printed in Johannes Hohlfeld, ed., *Dokumente der deutschen Politik und Geschichte von 1848 bis zur Gegenwart. Ein Quellenwerk für die politische Bildung und staatsbürgerliche Erziehung*, vol. 1: Die Reichgründung und das Zeitalter Bismarcks 1848–90 (Berlin: Dokumenten-Verlag, 1951), p. 296.

⁵⁶ [‘Und nun, meine Herren, dies neue Deutsche Reich, es ist gewiß nicht die Nachahmung des alten ehemaligen heiligen römischen Reiches – das war ein trübseliges Konglomerat widerstrebender Kräfte – das neue deutsche Reich das ist erwachsen aus dem Boden der allgemeinsten, Fürsten und Völker Deutschlands gleichmäßig durchdringenden patriotischen Erhebung, bekundet durch glänzende Waffenthaten in einer Art, wie sie bisher in der deutschen Geschichte noch nicht dagewesen sind.’] Carl von Säger in the North German Reichstag, session 7, 6 December 1870, printed in Bezold/Holtzendorff, *Materialien*, vol. 3, p. 222.

⁵⁷ [‘Und diese Mumie sollten wir in der harten Arbeit eines mehr den sechzigjährigen Einigungskampfes zu neuem künstlichen Leben auferweckt haben?’] Heinrich Geffcken, *Die Verfassung des Deutschen Reichs. Sechs Hochschulvorträge gehalten zu Rostock im Sommer 1900* (Leipzig: Deichert, 1901), p. 41.

undermine than to strengthen the idea of monarchical legitimacy. In fact, this concept lost most of its credibility when Prussia annexed Hanover, Nassau, and Hesse-Kassel in 1866. It was difficult to argue that these annexations were anything other than an act of flagrant crown robbery, given that Prussia expropriated three dynasties that had ruled in their principalities since the days of the Holy Roman Empire.⁵⁸ As *Le Charivari* observed, Prussia incorporated the annexed states into her territory like a seamstress who sewed together different parts of a blanket (see Caricature 14).

The fact that the Prussian king condemned Bismarck's annexation policy as a violation of monarchical sovereignty, but was unable to stop it only shows how passive the role of the princes had become.⁵⁹ They were no longer the prime agents of Germany's transformation. Rather, their ministers and bureaucrats now formed the centre of action. The last initiative to reform Germany that had emanated from the princes had been the unsuccessful Frankfurt *Fürstentag* in 1863. After that, Bismarck reduced the princes to the rank of lackeys on the Prussian state coach, as *Le Charivari* observed in the context of the negotiations for the unification treaties (see Caricature 15).

When we shift our perspective from monarchical to democratic legitimacy, the picture does not look much better. The parliamentary consent to the unification was driven by high levels of opportunism, a state of affairs that greatly reduced the legitimising effect of the parliamentary vote. This opportunism became manifest in the dramatic change that the liberals underwent in the course of unification. Before the summer of 1866, they had condemned Bismarck's German reform policy strongly, because they had disagreed with his conservative objectives as a matter of principle. Prussia's victory against Austria in the Battle of Königgrätz changed this attitude over night. As the longed-for goal of national unification

⁵⁸ See Hans A. Schmitt, "Prussia's Last Fling: The Annexations of Hanover, Hesse, Frankfurt, and Nassau, June 15-October 8, 1866," *Central European History* 8, no. 4 (1975): 316–47.

⁵⁹ On this issue, see Mommsen, *Das Ringen um den nationalen Staat. Die Gründung und der innere Ausbau des Deutschen Reiches unter Otto von Bismarck 1850 bis 1890*, pp. 170f., 174f.

came within reach, most liberals put their demands for civil rights, a unitary state, and parliamentary government to one side and opted to cooperate with Bismarck.⁶⁰

The political expression of this change of heart was the creation of the National Liberal Party in November 1866, which left stranded the few remaining left liberals who continued to oppose Bismarck. Already two months earlier, the national liberals had completed their reorientation toward Bismarckian *realpolitik* by adopting a bill in the Prussian House of Representatives that approved – or rather indemnified in retrospect – Bismarck's unconstitutional policy in the Prussian budget crisis of the 1860s. Half a year later, the national liberals provided the biggest share of the votes that approved the constitutional draft in the constitutive *Reichstag*. This pragmatic U-turn did not raise cheers everywhere. In the South, in particular, criticism was sharp. The *Münchener Punsch* saw the national liberals as gravediggers who had buried their own ideals for the sake of Bismarck's unification policy (see Caricature 16). Views such as this suggest that the parliamentary consent to the unification did little to equip the new federal union with a deeper democratic legitimacy.

The political debates of the unification did nothing to rectify this situation: questions of systemic legitimacy played almost no role in them. There was hardly any exchange of arguments about the advantages and drawbacks of a federal system. Rather, the entire discussion was characterised by a pragmatic consensus that understood a federal organisation of Germany to be the only way to bring about national unification. A fundamental critique of the federal solution hardly emerged. In the *Reichstag*, most of the few dissenting voices confined themselves to criticising Prussia's hegemony. Whenever anyone dared to raise concerns about Germany's confederate tradition or the violation of dynastic legitimacy, the national liberals immediately either accused him of trying to keep the fragmentation of the

⁶⁰ On the behaviour of the liberals in the unification era, see James J. Sheehan, *German Liberalism in the Nineteenth Century* (Chicago: Chicago University Press, 1978), chapter 3, pp. 79-122, and especially 123-40. See also Gerhard Eisfeld, *Die Entstehung der liberalen Partei in Deutschland 1858-78. Studie zu den Organisationen und Programmen der Liberalen und Demokraten*, Schriftenreihe des Forschungsinstituts der Friedrich-Ebert-Stiftung (Hanover: Verlag für Literatur und Zeitgeschehen, 1969).

nation alive or simply held him up to ridicule. A good example is their reaction to the warnings issued by the world-famous orientalist Heinrich von Ewald, MP for Hanover and member of the oppositional Guelph Party, which remained loyal to the deposed Hanoverian crown. During his ten-minute speech, the protocol notes ‘amusement’, ‘great amusement’, and ‘objection’ from the ranks of the liberals no less than seventeen times.⁶¹

Nor was the intellectual world much interested in the systemic legitimacy of the union. Constitutional lawyers focussed on questions of legality rather than legitimacy. The arts and humanities too were largely uninterested in this topic. While there was a comprehensive discussion on the nature of Germany as a cultural nation that deserved to unfold its potential in a national state, there was only one eminent scholar who made the concrete form of organisation of this new state – the federalness of the union – a topic of analysis, namely the philosopher Constantin Frantz. In his 1870 work *The Dark Side of the North German Confederation*, he criticised Bismarck’s model of federalism sharply. He argued that Prussia’s vast power and the simultaneous weakness of the other states made the federal union a cleverly constructed system of oppression.⁶² As he put it in a later work: ‘The lion and the mouse cannot form a federation’.⁶³ But his arguments were not taken seriously, because he proposed in the same breath to create a European confederation that would replace the individual nation states. At a time when German nationalism was at its zenith, this appeal to Europe was unrealistic. The great historian of German public law Michael Stolleis has called

⁶¹ [‘Heiterkeit’], [‘Große Heiterkeit’], [‘Widerspruch’] Heinrich Ewald in the North German *Reichstag*, session 7, 6 December 1870, printed in Bezold/Holtzendorff, *Materialien*, vol. 3, pp. 214-20.

⁶² Constantin Frantz, *Die Schattenseite des Norddeutschen Bundes vom preussischen Standpunkte betrachtet: eine staatswissenschaftliche Skizze* (Berlin: Stilke & van Muyden, 1870).

⁶³ [‘Der Löwe und die Maus können sich nicht conföderiren.’] Constantin Frantz, *Der Föderalismus, als das leitende Prinzip für die soziale, staatliche und internationale Organisation unter besonderer Bezugnahme auf Deutschland kritisch nachgewiesen und konstruktiv dargestellt* (Mainz: Kirchheim, 1879), p. 232. See also the edited volumes *Deutschland und der Föderalismus*, ed. Eugen Stamm (Stuttgart & Berlin: Deutsche Verlags-Anstalt, 1921) and *Der Föderalismus als universale Idee. Beiträge zum politischen Denken der Bismarckzeit*, ed. Ilse Hartmann, Beiträge zur Erneuerung des geschichtlichen Denkens (Berlin: Oswald Verlag, 1948).

it a 'quixotism'.⁶⁴ It is therefore unsurprising that Frantz' work failed to fuel any broader debate about the structural nature of federalism.

From this point of view, the fact that the union's federal character lacked legitimacy became manifest in that there was no serious discussion about it at all. Only two features of the unification process did appear to legitimise the creation of a small-German federation at least to some extent: war and political pragmatism. As sources of legitimacy for a new and complex federal order, however, both of these factors were highly problematic.

Germany's transformation from a confederation into a federal nation state was achieved primarily on the basis of military victory. From a long-term perspective, the unification process included one confederate war between the German Confederation and Denmark, one civil war among the German states, and one European great power war between the North German Confederation and its Southern allies on one side and France on the other. In 1866, the Prussian triumph against Austria was the main reason behind the conversion of the liberals, whose support was crucial to Bismarck's strategy for overcoming the division between the different state governments. Four years later, the common war effort against France broke the widespread opposition in the South against a Prussian-dominated unification. As *Kladderadatsch* pointed out one month after the outbreak of the war, the North and the South reached out to each other in a national baptism of blood (see Caricature 17). When the constitutive *Reichstag* approved the unification treaty with Bavaria in December 1870, Rudolf von Bennigsen, leader of the national liberals, put it with similar pathos:

We admit to the union no opponents, but German brothers, [...] who stand the test of an incredibly glorious fight for the position that our fatherland deserves and that will now find its expression in the German constitution, which first had to be won against a distrustful Europe and a hostile France.⁶⁵

⁶⁴ ['Donquichotterie'] Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2, 4 vols. (Munich: Beck, 1992), p. 434.

⁶⁵ ['Wir nehmen keine Gegner in den Bund auf, sondern deutsche Genossen, [...] bewährt in einem unerhört glorreichen Kampfe für die unserem Vaterlande gebührende Stellung, welche jetzt ihren Ausdruck finden wird in einer deutschen Gesamtverfassung, die dem mißtrauischen Europa und dem feindlichen Frankreich

On New Year's Day 1871, *Kladderadatsch* exposed this legitimising effect of the unification wars even more clearly by depicting the birth of the union as the emergence of the Emperor from the fire that Napoleon III had stirred in order to destroy Germany. With reference to Goethe's *Faust*, the subtitle of the caricature noted that by declaring war on Germany the French Emperor was 'part of that power which eternally wills evil and eternally works good' (see Caricature 18).

While making the unification possible, however, war was not a sustainable source of legitimacy. The national enthusiasm that the wars evoked was by its very nature temporary. Moreover, it had little to do with the federal structure of the new nation state. Already in 1871, therefore, it was clear that as soon as the war-trumpets fell silent and technical questions of government began to dominate daily political business, it would no longer be feasible to justify the federal organisation of Germany by reference to the wars that had brought it into existence.

Aside from war, the only other source from which the federal order could draw some legitimacy was the contingent convergence of political interests. Neither the monarchical governments nor the German parliaments adopted the federal option for historical, monarchical, democratic, or systemic reasons, but because this solution appeared best to accommodate the plurality of forces engaged in the process of unification.

For the Prussian government, a federal solution to the national question was the easiest way to establish hegemony over Germany. *Le Charivari* realised this less than a month after the North German Confederation had been founded. The oil of the Prussian military monarchy, the journal pointed out, was spreading across the German map and would soon reach the southern states as well (see Caricature 19).

The governments of the other German states, most of which were monarchies of one kind or another, endorsed a federal organisation of Germany primarily because they saw it as the

erst abgewonnen werden mußte.'] Rudolf von Bennigsen in the North German Reichstag, session 10, 9 December 1870, printed in Fenske, *Reichsgründung*, no. 130, p. 443.

only chance of preserving monarchical sovereignty in a national state whose creation they could no longer prevent. Since the dissolution of the German Confederation, confederate solutions were no longer a realistic option. A unitary state, on the other hand, was incompatible with the idea of leaving the sovereign status of each of the twenty-five princes unchanged. When he gave in to the pressure of offering the Prussian king the imperial crown, Ludwig II of Bavaria bemoaned his dilemma in a letter to his brother Otto:

If Bavaria could be on her own, independent from the union, then it wouldn't matter; but as this would literally be a political impossibility, as the people and the army would be against it and as the crown would therefore lose all support in the country, it is, as dreadful and terrible as it remains, an act of political prudence, and indeed of necessity in the interest of the crown and the country if the King of Bavaria makes this offer, [...] because after all Bavaria must join the union for political reasons [...].⁶⁶

For similar reasons of political necessity, a federal solution seemed to be the least bad option to most princes. Very few adopted a different view. The Duke of Saxe-Coburg-Gotha was the only monarch who advocated the creation of a German unitary state. But he was an outsider among the princes anyway. He had supported the liberal German National Club, the *Deutscher Nationalverein*, and its campaign for a lesser-German national state since the late 1850s and endorsed the idea of a parliamentarily responsible national government. It is no surprise, then, that his voice counted for little among the princes.

The parliaments, finally, accepted that Germany would be organised federally because they saw this as their best chance of achieving what the popular movement had been fighting for since the Napoleonic Wars: the creation of a German national state. The national liberal majority of MPs certainly harboured other ideals. As they ultimately desired a unitary state with a parliamentary government, they understood the federal constitution of 1871 only as a

⁶⁶ ['Könnte Bayern allein, frei vom Bunde, stehen, dann wäre es gleichgültig, da dies aber geradezu eine politische Unmöglichkeit wäre, da Volk und Armee sich dagegen stemmen würden und die Krone mithin allen Halt im Land verlöre, so ist es, so schauerhaft und entsetzlich es immerhin bleibt, ein Akt von politischer Klugheit, ja von Notwendigkeit im Interesse der Krone und des Landes, wenn der König von Bayern jenes Anerbieten stellt, [...] nachdem Bayern nun doch einmal aus politischen Gründen in den Bund muß [...]'] Ludwig II to his brother Otto, November 1870, printed in Deuerlein, *Augenzeugenberichte*, p. 239.

partial success. They approved it because the failure of the 1848 revolution had ‘taught’ them that they could not found a nation state against the will of the monarchical governments. In light of this experience, their strategy was to adopt the federal constitution as a compromise that they would later try to renegotiate in the direction of greater centralisation and parliamentary government.⁶⁷ As the national liberal MP for Hagen, Freiherr von Finke, put it in the constitutive *Reichstag* of 1867: ‘First close the deal for the house, and then, perhaps, make it cosier.’⁶⁸

Pragmatic views such as this guided the decisions of both the monarchical governments and the German parliaments in the unification. Federalism was thus adopted as Germany’s future form of organisation not because it was anybody’s ideal, but simply because it promised to address the greatest range of political interests. In other words, the unification was an act of *realpolitik* on every side.

Its foundations in pragmatism and convenience had one advantage: they made unification work. In contrast to the manifold other proposals that circulated in the first half of the 1860s, Bismarck’s federal solution always had a good chance of success because it aimed to accommodate the interests of all important political actors at least to some degree. Exactly the opposite was true, for example, for the Southern Union Plan hatched by the Bavarian prime minister and later Chancellor Chlodwig zu Hohenlohe-Schillingsfürst. He proposed to create an independent southern federation and to unite it with the North German Confederation in another confederate union. Since it failed to take into account the desire of the parliaments for a uniform national state, this plan flopped no fewer than three times, twice in the late 1860s

⁶⁷ Dieter Langewiesche, “Bismarck und die Nationalliberalen,” in *Otto von Bismarck und die Parteien*, ed. Lothar Gall, Wissenschaftliche Reihe / Otto-von-Bismarck-Stiftung 3 (Paderborn: Schöningh, 2001), 73–89.

⁶⁸ [‘bringen Sie das Haus erst unter Dach, um es dann vielleicht wohnlicher einzurichten.’] Freiherr von Finke in the constitutive *Reichstag*, session 12, 13 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 287.

and finally in November 1870 when the Bavarian government brought it up again in an act of last minute panic.⁶⁹

However, the downside of making the legitimacy of the union dependent on shared political interests was that these could easily change over time and, as a result, denude the federal order of its *raison d'être*. The unification thus placed Germany's organisation as a federal state at the mercy of how the confrontation between monarchical and parliamentary power would subsequently develop. In April 1867, *Kladderadatsch* exposed this dilemma nicely. Since the federal constitution had been 'conceived on the earth of reality', the satire magazine argued, the true shape of the infant union would only become clear once it had grown out of its swaddling clothes (see Caricature 20).

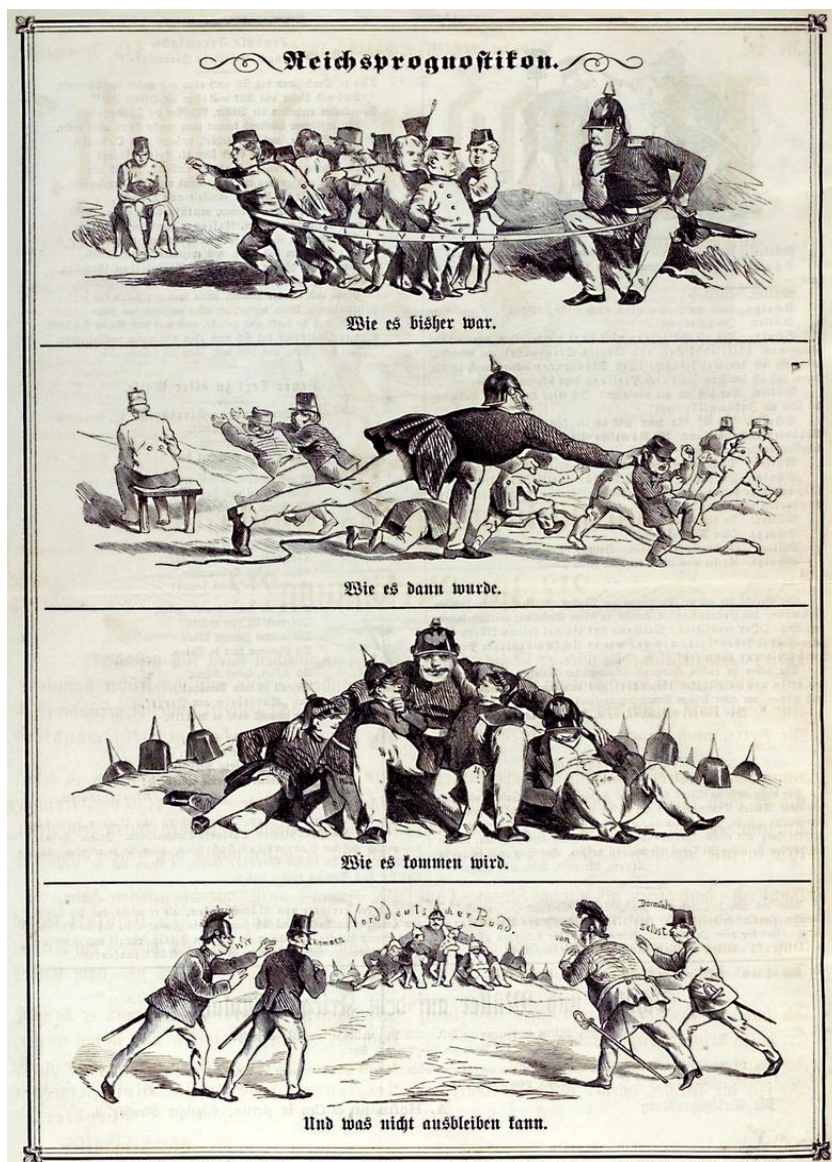
As this observation suggests, the fact that the unification did not equip the federal organisation of the new nation state with any deep and abiding source of legitimacy had an extremely problematic impact on the evolution of the union in the long run. In forging Germany's future, *Le Charivari* had already pointed out in the context of the war against Denmark in 1864, Prussia acted like a rough blacksmith who replaced law by power (see Caricature 21). To put it in more concrete terms, the unification made power rather than law the main principle of the new federal union. Nowhere was this more obvious than in the special rights of the southern states. The fact that these had been incorporated into the constitution demonstrated to everyone that Germany's federal structures were little more than an instrument of power that could be changed for political purposes at any time.

Kladderadatsch exposed this lack of any deeper legitimacy of the federal union with a great sense for the importance of symbolic policies (see caricature 22). With reference to the Latin proverb 'the end crowns the work', the satirical magazine suggested that as the endpoint of the unification process the creation of the imperial crown revealed the true nature of the

⁶⁹ On the Southern Union Plan, see Wilhelm, *Das Verhältnis der süddeutschen Staaten zum Norddeutschen Bund (1867-1870)*, pp. 79-96. See also Mommsen, *Das Ringen um den nationalen Staat. Die Gründung und der innere Ausbau des Deutschen Reiches unter Otto von Bismarck 1850 bis 1890*, pp. 196f.

union: the establishment of the *Kaisertum* was intended to draw a cloak of imperial splendour over the disagreeable nudity of the federal order's origins in expedience, as manifested in the unification treaties. 'There are certain things', the journal observed, 'that one gladly covers with the Emperor's cloak of love'.

Caricature 1: 'Reichsprognostikon', *Kladderadatsch* (September 1866), vol. 19, no. 41, p. 166.



Title: Prognosis for the Reich

Subtitles (from top to bottom): How it was so far./How it then became./How it will come./And what will be inevitable.

Caricature 2: 'Der deutsche Bürgerkrieg in Bismarck'scher Auffassung', *Münchener Punsch* (27 August 1865), vol. 18, no. 35, p. 275.

Der deutsche Bürgerkrieg in Bismarck'scher Auffassung.



Die Drei am Tische. Ja zum Donnerwetter — was soll denn das bedeuten?

v. Bismarck. Nur ruhig, bleiben Sie ganz neutral! Wir schießen lauter localisirte Kugeln!

Title: The German Civil War according to Bismarck's point of view

Subtitles: The three at the table: Gosh! — what the hell does that mean?

Bismarck: Calm down, just stay neutral! We are just shooting localised bullets!

Caricature 3: 'Un Nouveau Faust', Le Charivari (6 May 1867), vol. 36.



Caricature 4: 'Die Tri-Aß', *Münchener Punsch* (24 January 1864), vol. 17, no. 4, p. 25.

Münchener PUNSCH.

Ein humoristisches Originalblatt von M. E. Schleich.
Siebzehnter Band.

Nro. 4. Halbjähriger Abonnementspreis: in Bayern 1 fl. 24. Jan. 1864.
Im Ausland erfolgen die üblichen Postaufschläge.

Die Tri-Aß.



Bayern. Die „Herzen“ habe ich ohnehin schon alle,
jetzt spiele ich meinen größten Trumpf aus! Wenn Ihr Cou-
rage habt, so steht zu!

Title: The Tri-Ace

Subtitles: Bavaria: I got all of the 'hearts' already, now I'll play my biggest trump! If you have the courage, make a trick!

Caricature 5: 'Deutschlands Zukunft', *Kikeriki* (1870).



Title: Germany's future.

Subtitles: Will it be kept together under one hat? I rather think it will be kept under a spiked helmet!

Caricature 6: 'Le Nouveau Blason Prussien', Le Charivari (30 August 1871), vol. 40.



Title: The new Prussian crest.

Caricature 7: 'Der Neue Gulliver', *Le Charivari* (1866).



Title: The new Gulliver

Caricature 8: 'A tout prix', *Kladderadatsch* (December 1870), vol. 23, no. 56, p. 484.



Title: At any cost.

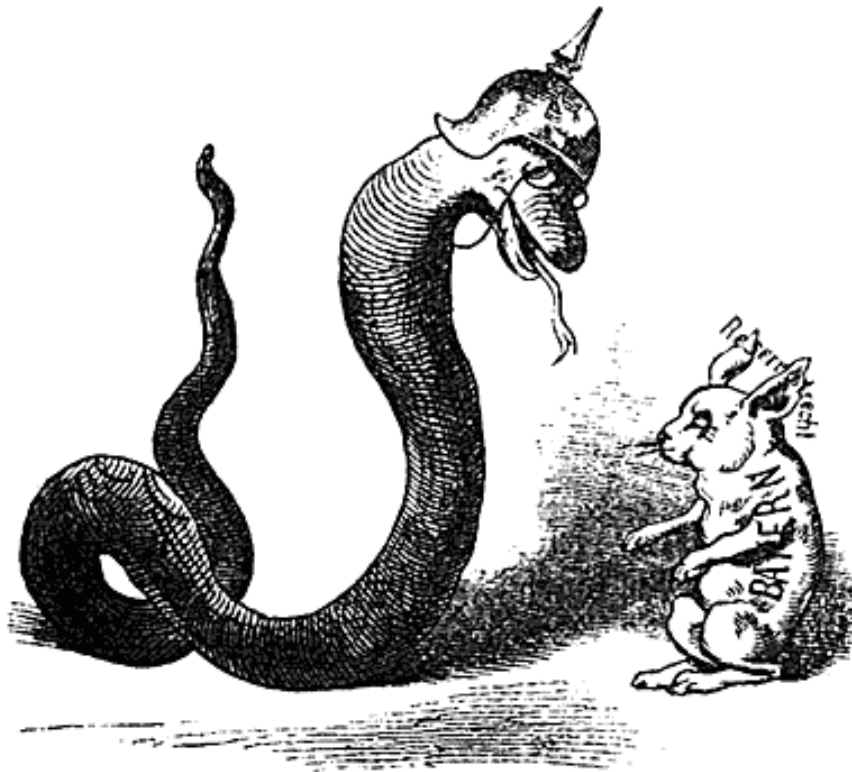
Subtitles: The small ones: The coat doesn't fit.

The tall one: Go right ahead! We'll make it fit. Everybody's measurements will be taken, and then the coat will be changed until it will fit comfortably. Go right ahead!

Word on the coat: union

Caricature 9: 'Preußens idealer Reichsgedanke und sein Verhältnis zu Bayern', *Die Bremse* (4 April 1874), vol. 3, no. 14, p. 105.

Preußens idealer Reichsgedanke



und sein Verhältniß zu Bayern.

Das Häselein wird vielleicht zuletzt gefressen, aber gefressen wird es.



Title: Prussia's ideal conception of the Reich

Subtitles: and its relation to Bavaria. The rabbit will perhaps be eaten last, but it will be eaten.

Word above the rabbit's head: special rights.

Caricature 10: 'Auch ein Veteran', *Die Bremse* (9 May 1874), vol. 3, no. 19, pp. 145f.

Auch ein Veteran,



der 1866 und 1870/71 und noch öfter dabei war,
aber das Veteranenfest nicht mitmacht.



Mich lud man nicht zum stolzen Feste,
Und bin doch auch dabei gewesen
Bei Krieg und Schlacht; ich that das Beste,
Ihr könnt 's in der Geschichte lesen.

Für Fürst und Vaterland ich habe
Mit jedem Feinde mich gemessen,
Ich that es ohne Dankesgabe, --
Hat man das alles denn vergessen?

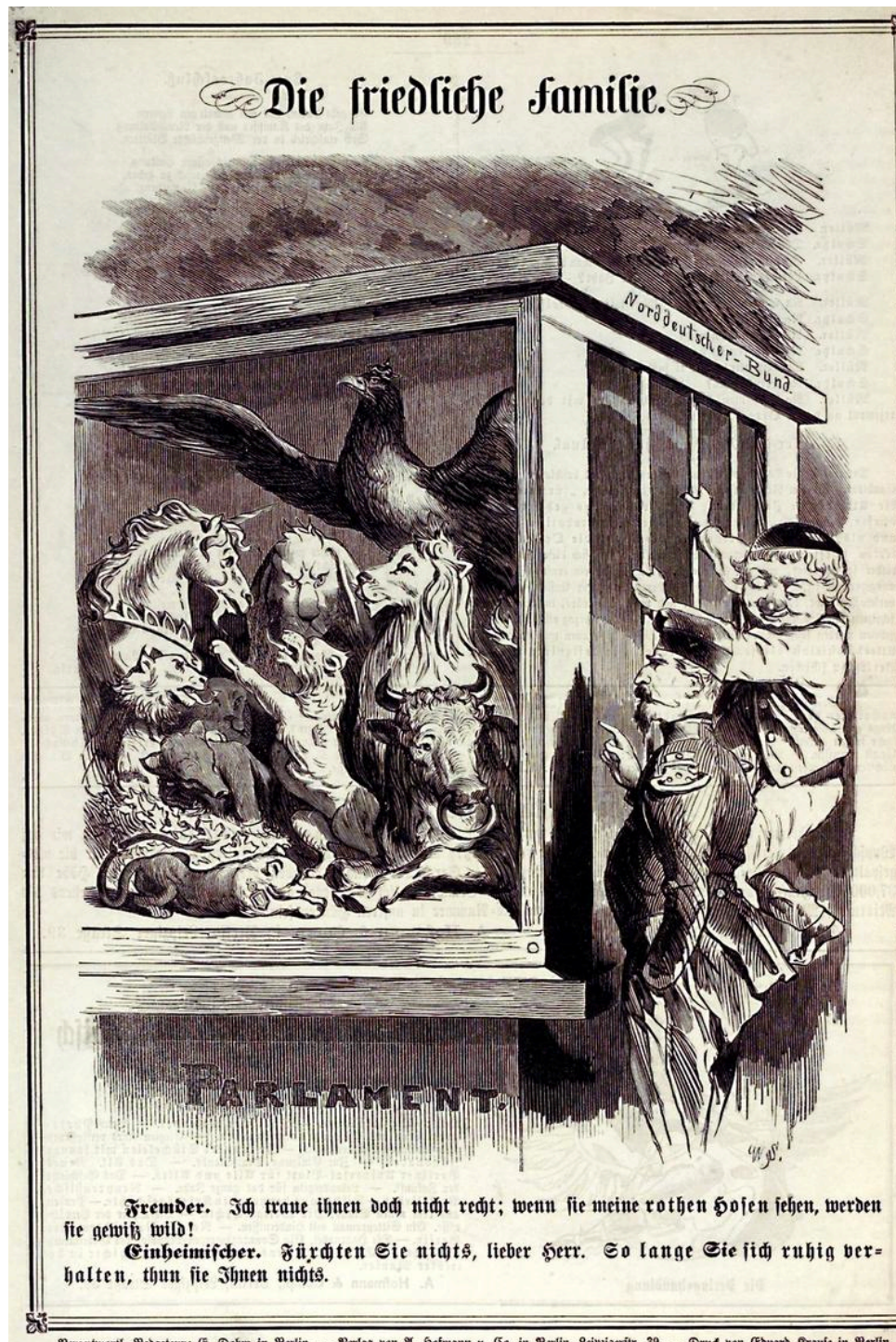
Title: Also a veteran,

Subtitles: who was there in 1866 and 1870/71 and on other occasion, but who does not participate in the veterans' celebration.

Poem: I was not invited to the proud celebrations,/even though I was there/in the war and on the battlefield; I gave my best,/you can read it in the history books.

For the prince and fatherland I/fought with every foe,/I did it without thanks -- /has of all this been forgotten?

Caricature 11: 'Die friedliche Familie', *Kladderadatsch* (December 1866), vol. 19, no. 59f., p. 248.



Title: The peaceful family.

Subtitles: Foreigner: I don't trust them yet; if they see my red trousers, they'll certainly run wild!

Native: Fear not, good Sir. As long as you stay calm, they'll not do anything to you.

Caricature 12: 'Constitutionelle Drehscheibe', *Kladderadatsch* (March 1869), vol. 22, no. 14f., p. 100.



Title: Constitutional Carrousel.

Subtitles: The House of Lords is old, the *Reichstag* young again, but man hopes for the better.

Label on the four riders (clock-wise): *Landtag* (Prussian House of Representatives); House of Lords; customs (parliament of the customs union); *Reichstag*

Caricature 13: 'Actualités', *Le Charivari* (9 July 1866), vol. 35.



—Imbécile tu as cassé cette assiette en mille morceaux?—Madame, c'est la politique! je voulais me rendre compte de ce qu'était actuellement la confédération Germanique.

Title: News

Subtitles: You fool, why did you break this plate into a thousand pieces? – Madam, it's all because of politics! I just wanted to see how matters are with the German Confederation these days.

Caricature 14: 'Ce que c'est pourtant que de savoir se servir d'une aiguille', *Le Charivari* (September 1866).



Subtitles: It is one thing to know how to use the needle...but it is a skill that should not be abused.

Caricature 15: 'Comment Bismarck comprend l'unité allemande', *Le Charivari* (26 December 1870), vol. 39.

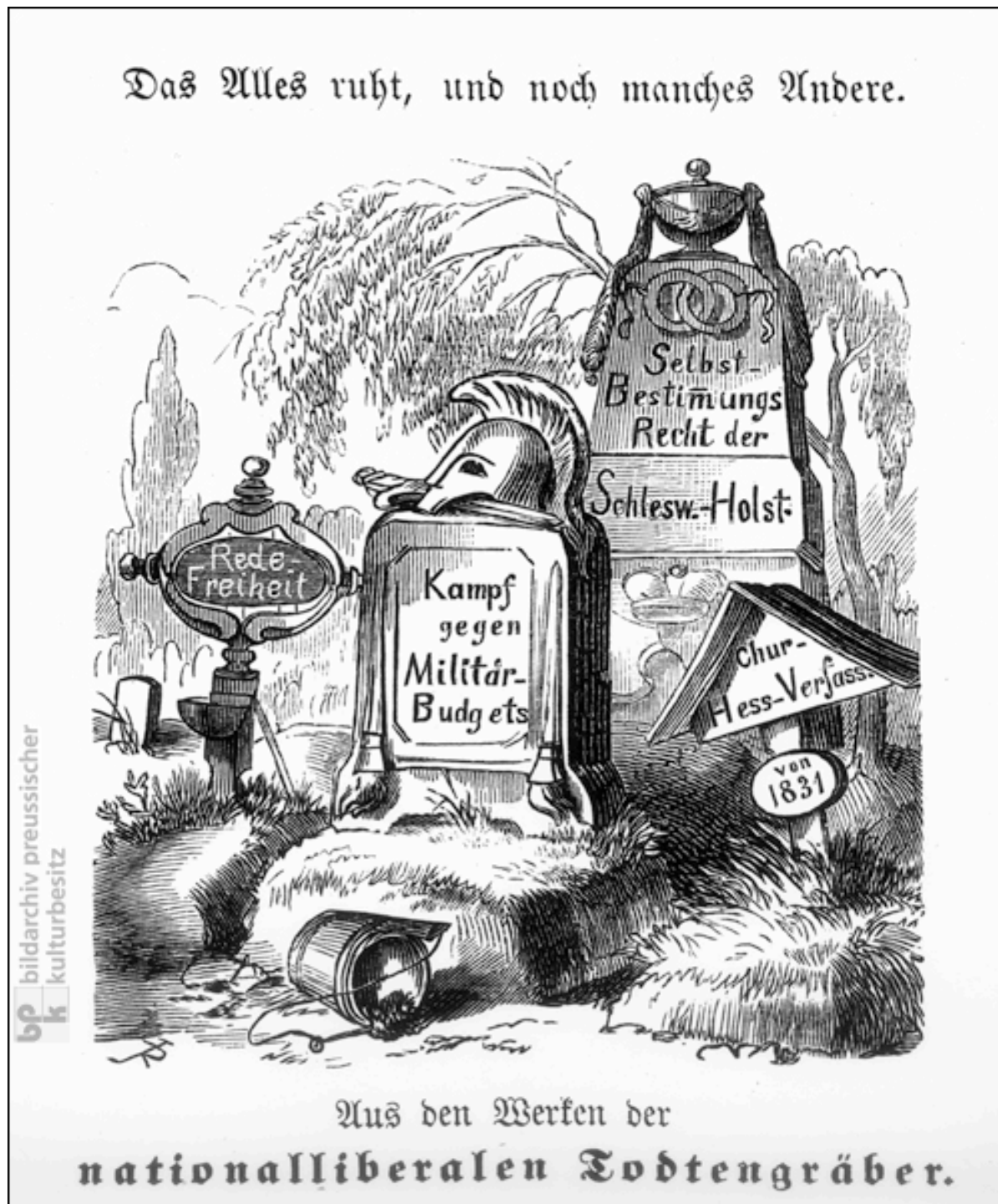


Comment Bismarck comprend l'unité allemande.

Title: News

Subtitles: How Bismarck understands German unity

Caricature 16: 'Das Alles ruht, und noch manches Andere.', *Münchener Punsch* (April 1868).



Title: All of this and many other things lie buried.

Subtitles: From the works of the national-liberal gravediggers.

Inscriptions on the gravestones (from left to right): freedom of speech; fight against the military budget; right of self-determination for the people in Schleswig-Holstein; 1831 constitution of Electoral Hesse

Caricature 17: 'Mit Blut getauft', *Kladderadatsch* (August 1870), vol. 23, no. 37, p. 344.



Title: Baptised with blood.

Subtitles: The true bridge over the Main River.

Caricature 18: 'Glück auf zum neuen Jahr', *Kladderadatsch* (Januar 1871), vol. 24, no. 1, p. 4.



Title: Happy New Year!

Subtitles: A part of that power which eternally wills evil and eternally works good. (Goethe, Faust)

Label on the cauldron: Germany's downfall.

Caricature 19: 'Une tache d'huile', *Le Charivari* (2 May 1867), vol. 36.



Title: News
Subtitles: An oil stain.

Caricature 20: 'Illustrierter Rückblick' (segment), *Kladderadatsch* (Juni 1867), vol. 20, no. 29f., p. 160.



Subtitles: On the earth of reality, the North German Confederation has conceived the Reich constitution, of which we will know whether it makes sense only after it has grown out of its swaddling clothes.

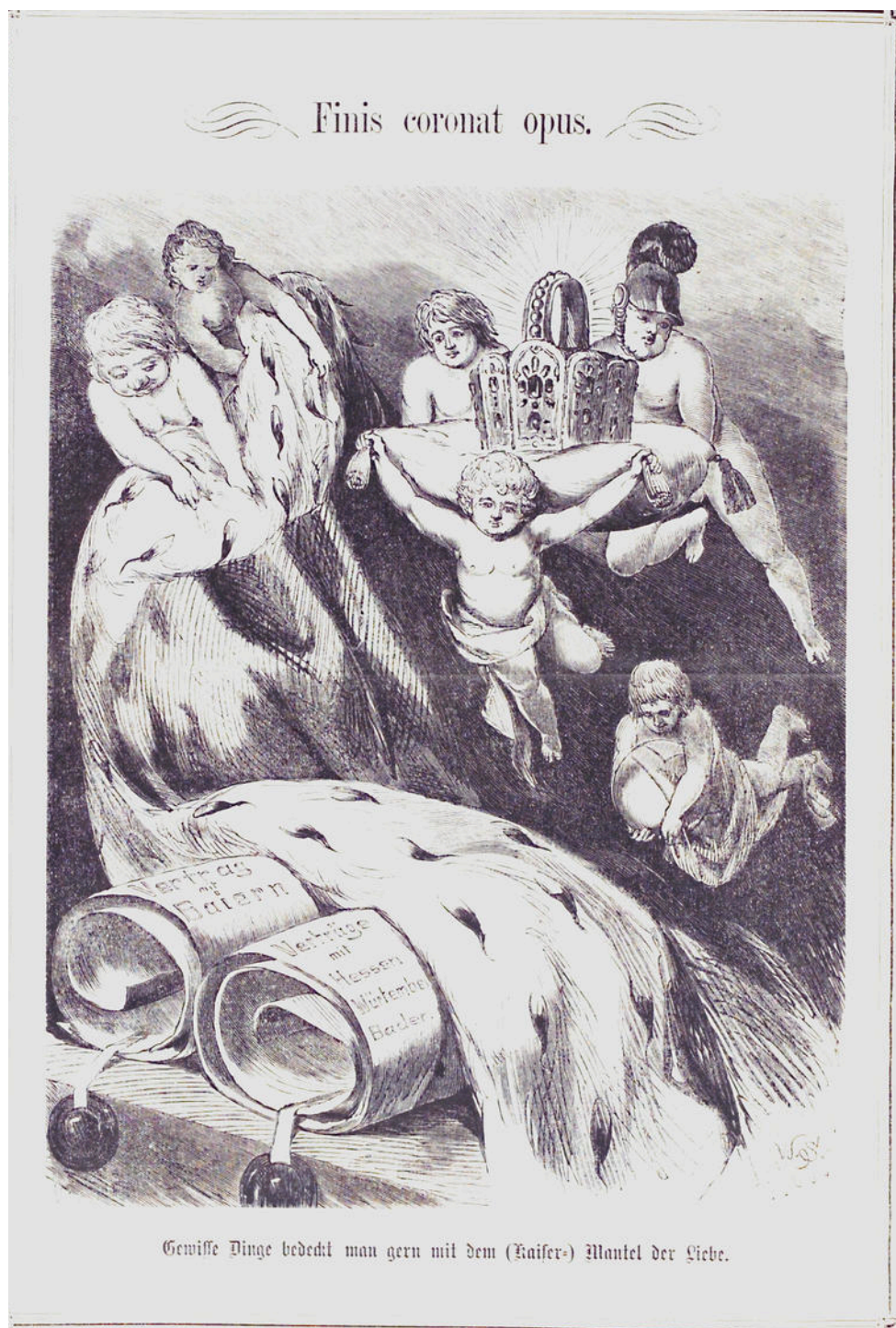
Caricature 21: 'Actualités', *Le Charivari* (2 September 1864), vol. 33.



Title: News

Subtitles: The professor of the new Prussian law develops his guiding principle: power trumps law – Tense your biceps, by the Devil! A good blow with the fist! That's all you need!

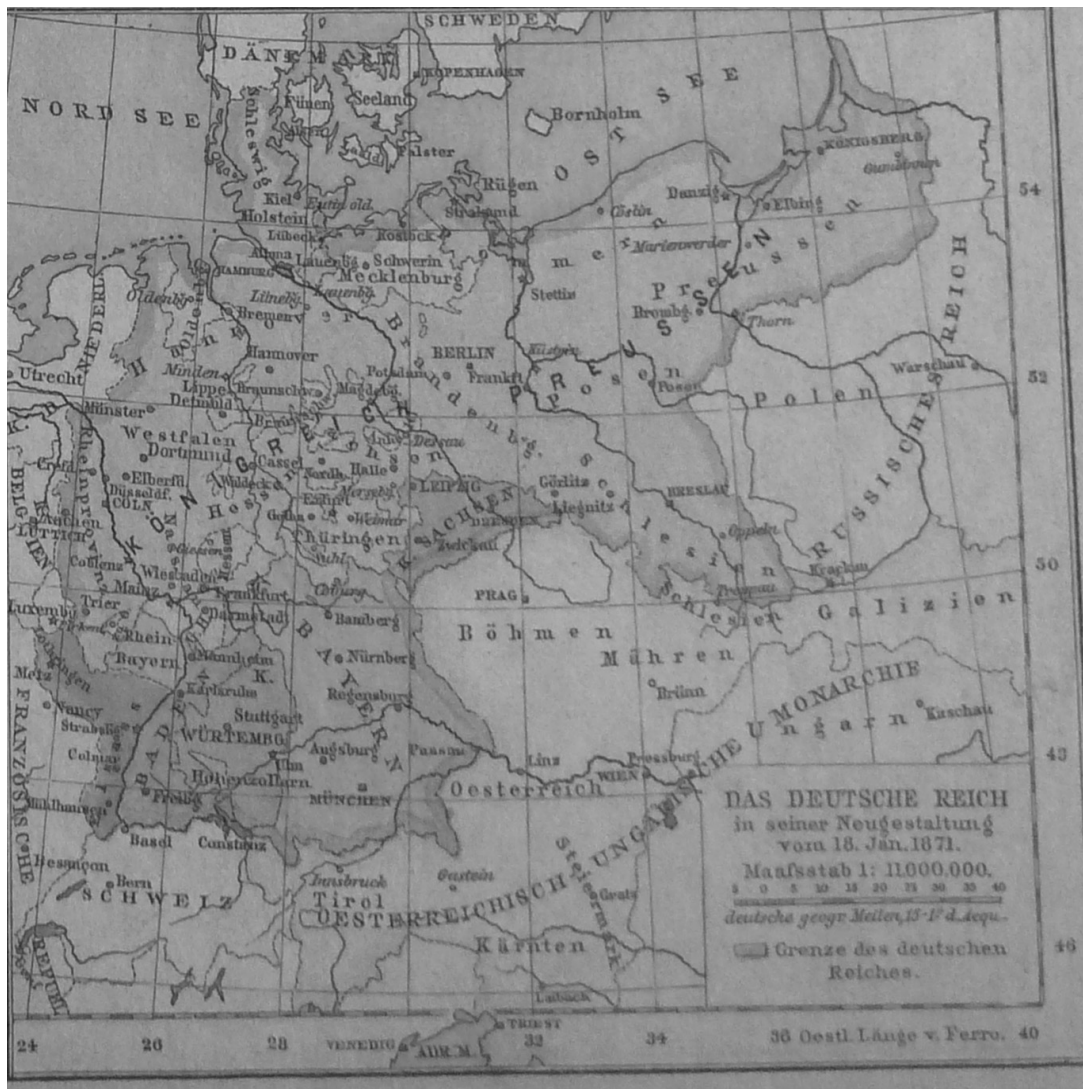
Caricature 22: 'Finis coroant opus.', *Kladderadatsch* (December 1870), vol. 23, no. 59f., p. 528.



Title: The end crowns the work.

Subtitles: There are certain things that one gladly covers with the Emperor's cloak of love.

CHAPTER II CONSTITUTION



Map 1: Imperial Germany in 1871.

When we look at the map of Germany in 1871, we realise how diverse the imperial federal state was. Although rather uniform in comparison to the patchwork of more than three hundred territories that had made up the Holy Roman Empire, Imperial Germany still comprised twenty-five very different states: the federal hegemon Prussia; the four middling states Bavaria, Württemberg, Saxony, and Baden; and the twenty small states Hesse, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg, Saxe-Weimar-Eisenach,

Brunswick, Saxe-Meiningen, Saxe-Altenburg, Saxe-Coburg and Gotha, Anhalt, Schwarzburg-Sondershausen, Schwarzburg-Rudolstadt, Waldeck-Pyrmont, Reuß Senior Line, Reuß Junior Line, Schaumburg-Lippe, Lippe, Lübeck, Bremen, and Hamburg. Among these were four kingdoms, six grand duchies, five duchies, seven lower-ranking principalities, and three Hanseatic republics. Even after unification, diversity thus remained one of the main characteristics of Germany.¹

How did the constitutional principles look that held this diverse union together? In other words, what was the legal framework in which the federal state evolved? Legal historians have composed several outstanding studies about the normative structures of the imperial constitution.² But in order to understand the political motives behind these structures it is not enough to focus on constitutional provisions alone. Rather, we have to look at the constitution in light of the contemporary political debate about it.

The main forum of this debate was the *Reichstag* that negotiated the constitutional draft of the united governments between February and April 1867. This constitutive constitutional assembly was elected according to the electoral law that the revolutionary Frankfurt constitution had established in 1849.³ It determined that the parliament was elected by universal and direct election with a secret ballot. This regulation was much more progressive than the relevant provisions for most of the state parliaments, in particular the Prussian three-class franchise. Bismarck embraced this progressive electoral law not because he was a supporter of universal suffrage, but because he saw it as a strategic move that would gain him the support of the liberals for his unification policy. Moreover, he was relatively sure that the

¹ On the cultural aspects of this diversity, see for example Alon Confino, *The Nation as a Local Metaphor: Württemberg, Imperial Germany, and National Memory, 1871-1918* (Chapel Hill and London: University of North Carolina Press, 1997).

² See above all Holste, *Bundesstaat*, pp. 128-243 and Huber, *Verfassungsgeschichte*, vol. 3, pp. 785-1074.

³ See FC (1849), § 94.2 and *Gesetz, betreffend die Wahlen der Abgeordneten zum Volkshause*, 12 April 1849, FRGBL (1849), pp. 79-83. A treaty between Prussia and the other North German governments determined that each state had to organise the elections according to the Frankfurt provisions. See *Bundesvertrag Preußens mit den norddeutschen Staaten*, 18 August 1866, art. 5, printed in Huber, *Dokumente*, vol. 2, no. 196, pp. 268f. On the electoral law of the Frankfurt Assembly, see Huber, *Verfassungsgeschichte*, vol. 2, pp. 606-8 and Manfred Botzenhart, *Deutscher Parlamentarismus in der Revolutionszeit: 1848-1850*, *Handbuch der Geschichte des deutschen Parlamentarismus* (Düsseldorf: Droste-Verlag, 1977), pp. 141-63.

elections would not produce a radical majority, as the 1848 revolution had ‘taught’ him that the people tended to vote conservatively.⁴ His strategy worked out perfectly: the elections of 12 February produced a conservative liberal majority that largely backed his course of action.⁵

Most of the chief problems discussed by the *Reichstag* concerned the relationship between the federal level and the constituent states. Five out of six special debates on the agenda dealt with this issue in some form or another.⁶ The federal nature of Germany thus determined the parliamentary debate about the constitution more than any other topic. This dominance offers us the chance to expose the different political motives behind the federal structures of the constitution by looking at the main points of controversy between the parliamentarians and the monarchical governments.

In the *Reichstag*, the political aspirations of the liberals were particularly important because they constituted slightly more than half of all MPs, who numbered 297 in total. Three issues were crucial. First, the liberals preferred a unitary organisation of Germany. Bismarck and the united governments insisted on the sovereignty of the states. Second, the liberals wanted to establish a national catalogue of civil rights and political liberties, just like the Frankfurt constitution had done in 1849. The state governments rejected this idea as an infringement of their sovereignty. Third, the liberals called for the introduction of federal

⁴ On Bismarck’s understanding of elections, see Margaret Lavinia Anderson, *Lehrjahre der Demokratie. Wahlen und politische Kultur im Deutschen Kaiserreich* (Stuttgart: Franz Steiner, 2009), p. 33; Andreas Biefang, *Die andere Seite der Macht: Reichstag und Öffentlichkeit im “System Bismarck” 1871-1890*, Beiträge zur Geschichte des Parlamentarismus und der politischen Parteien 156 (Düsseldorf: Droste, 2009), p. 45; and Hans-Ulrich Wehler, *Das Deutsche Kaiserreich, 1871-1918*, Kleine Vandenhoeck-Reihe 1380 (Göttingen: Vandenhoeck & Ruprecht, 1973), p. 61.

⁵ For the distribution of seats in the constitutive *Reichstag*, see Georg Hirth, ed., *Hirth’s Parlaments-Almanach* (Berlin: Duncker, 1867), pp. 105-8. On the influence of the constitutive *Reichstag* in general, see Klaus Erich Pollmann, “Parlamentseinfluß während der Nationalstaatsbildung 1867-1871,” in *Regierung, Bürokratie und Parlament in Preußen und Deutschland von 1848 bis zur Gegenwart*, ed. Gerhard Albert Ritter (Düsseldorf: Droste, 1983), pp. 56-75, and chapter 1 in Pollmann’s book *Parlamentarismus im Norddeutschen Bund 1867-1870*, Handbuch der Geschichte des deutschen Parlamentarismus (Düsseldorf: Droste, 1985), pp. 21-36.

⁶ See Ernst Bezold, ed., *Alphabetisches Sprech- und Sach-Register nebst zwei Congruenz-Registern zu der Verfassung des Norddeutschen Bundes und der Deutschen Reichsverfassung, sowie zu den Verhandlungen und Verträgen der verbündeten norddeutschen und beziehungsweise der süddeutschen Regierungen und den Reichstags- beziehungsweise Landtags-Verhandlungen* (Berlin: Habel, 1873), pp. 10-12.

ministries that would be responsible to the national parliament, while Bismarck and the princes were determined to prevent the creation of parliamentary government at all costs.

In discussing these issues and the federal structures of the constitution the parliamentarians very often adopted a historical perspective. For them, it was a matter of great importance how far the constitution was linked to Germany's recent constitutional past. In fact, their decisions were often shaped by the experiences of how previous constitutional orders had developed. In the preliminary proceedings of the *Reichstag*, this issue became most clear in the comments by Benedict Waldeck. The MP for Berlin had been one of the leaders of the Prussian left liberals during the 1848 revolution, when he had prepared a progressive constitutional charter that had introduced parliamentary government. Even though he had been reduced to a second-rank figure after the failure of the revolution, his words still carried a lot of weight. Drawing on his political experience, he now warned his colleagues that

if we want to speak about this constitutional draft properly, it is absolutely necessary that we familiarise ourselves thoroughly with the conditions [...] under which the German Confederation succeeded the Holy Roman Empire and with those efforts that arose in Frankfurt, in Erfurt, and then also in other projects [...].⁷

As Waldeck's warning indicated, three historic constitutions stood at the centre of discussion. The first was the constitution of the German Confederation, consisting of two international treaties between the German states, the *Bundesacte* of 1815 and the Vienna Final Act of 1820; the second was the federal constitution of the Frankfurt Assembly, framed in the context of the 1848 revolution; and the third was the 1849 draft constitution of the Erfurt Union, the

⁷ ['Es ist durchaus nothwendig, daß, wenn man gründlich über diesen Verfassungs-Entwurf sprechen will, man sich in diejenigen Zustände vertieft, [...] welche auf das Deutsche Reich den Deutschen Bund folgen ließen, in die Bestrebungen, welche in Frankfurt, welche in Erfurt und dann nachher auch in anderen Projecten theilweise auftauchten [...].'] Franz Duncker in the constitutive *Reichstag*, session 9, 9 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 92.

attempt by Prussia to outmanoeuvre Austria in the struggle for control over German unification by revising the Frankfurt draft in a conservative way.⁸

But there was no general consensus on how much this legacy shaped – or should be allowed to shape – the new constitution. In the opening debate, Benedict Waldeck argued that the constitutional draft contained ‘reminiscences of almost all parts of the German development’.⁹ His national liberal colleague Johannes von Miquel refuted this assertion by claiming that ‘great people do not copy’.¹⁰

It was clear to the MPs, however, that any structural references that the new constitution would make to the German Confederation would automatically strengthen the monarchical governments, because the Confederation had been designed to protect the princes. In the same manner, it was clear that any elements that the constitution would take over from the constitutional drafts of Frankfurt and Erfurt would enhance the power of the *Reichstag*, as these revolutionary charters were role models for a parliamentary German federal state. In short, the question of whether and how the new constitution would draw on its predecessors was directly linked to the balance of monarchical and parliamentary interests involved in the process of deliberation. In order to understand the character of the constitution and its underlying motives, then, we need to establish the extent to which the federal strands of the new document derived from Frankfurt, Erfurt, or the Confederation.¹¹

This chapter will examine the genealogy of the Empire’s federal structures. It will first look at how the constitution guaranteed a federal mode of organisation and how it distributed

⁸ On the Erfurt Union, see Gunther Mai, ed., *Die Erfurter Union und das Erfurter Unionsparlament 1850* (Cologne: Böhlau, 2000) and the reference book by Jochen Lengemann, *Das Deutsche Parlament (Erfurter Union) von 1850. Ein Handbuch: Mitglieder, Amtsträger, Lebensdaten, Fraktionen* (Jena: Urban & Fischer, 2000).

⁹ [‘Reminiscenzen fast aus allen Teilen der deutschen Entwicklung’] Benedict Waldeck in the constitutive *Reichstag*, session 9, 9 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 95.

¹⁰ [‘große Völker kopieren nicht’] Johannes von Miquel in the constitutive *Reichstag*, session 9, 9 March 1867, printed in *ibid.*, p. 106.

¹¹ For brief structural comparisons, see Hans Boldt, ‘Der Föderalismus in den Reichsverfassungen von 1849 und 1871,’ in *Die Amerikanische Verfassung und Deutsch-Amerikanisches Verfassungsdenken*, ed. Hermann Wellenreuther and Claudia Schnurmann, Krefelder Historische Symposien: Deutschland und Amerika. Zweites Symposium, veranstaltet in Krefeld 28.-31. Mai 1987 (New York & Oxford: Berg, 1990), pp. 297–333 and Holste, *Bundesstaat*, pp. 109–16.

competences between the national level and the states. In this context, it will become obvious why the liberals gave up their demands of creating a unitary state and a national catalogue of basic rights. After that, this chapter will examine the functions of the different federal constitutional organs. This will make clear that the *Bundesrat* was the actual centre of the constitution – a state of affairs that made the introduction of parliamentarily responsible federal ministries structurally impossible.

This analysis will demonstrate that the federal structures of the constitution protected monarchical power by combining different features from previous German constitutions in a new way. The ill-defined juxtaposition of confederate and unitary elements that resulted from this combination made it likely that over the course of the pending economic, social, and cultural integration of the union federal structures would dissolve and give way to a more centralised order, in which the parliament would enjoy much more power. The *Reichstag* further reinforced this predisposition of the constitution by using amendments to transform the role of the Chancellor. This move, in turn, helps to explain why the liberals gave up many of their key desires in 1867: they had good reason to believe that their objectives would materialise in the long run.

States

The constitution opened with the solemn declaration of the princes that they ‘conclude an everlasting union’.¹² Very similar in wording to the introductory clause of the *Bundesacte*, this declaration suggested that the constitution was a treaty among monarchs who were founding a confederate league of princes.¹³ But while the *Bundesacte* confined the purpose of the Confederation to defence, the preamble of the imperial constitution held that the Empire had been founded for more general reasons, namely not only ‘for the protection of the

¹² [‘schließen einen ewigen Bund’] RV (1871), preamble.

¹³ *Bundesacte* (1815), art. 1.

territory of the union and the law that applies there', but also for the purpose of 'caring for the welfare of the German people'.¹⁴

This general purpose of the union implied that the Empire was more integrated than a confederation. The articles following the preamble then established a federal order, most importantly by defining a federal territory, introducing a common nationality for the citizens of all constituent states, and creating a wide range of federal constitutional organs.¹⁵

But the constitution did not make this federal organisation of the union an irrevocable feature of Germany. In contrast to the Vienna Final Act and most other constitutions, it left the question completely open of what kind of entity the union was under constitutional and international law.¹⁶ In theory, Germany could thus be reorganised as a centralised or confederate state any time. Many of the most basic provisions necessary for establishing a stable federal order were not addressed by the constitution at all. It neither determined the status of the states in the union, nor did it guarantee their permanent existence. Moreover, unlike in the Frankfurt draft there were no regulations about the procedure and limits of a possible reorganisation of the federal territory.¹⁷ Under the constitution, it was thus perfectly legal to abolish all states and to create one uniform German territory that would be run by a central government on its own.

This meant that the princes did not enjoy a constitutional guarantee of their sovereign status. Why, then, did they propose such a potentially dangerous charter for a union that they had created primarily in order to protect monarchical power? On the one hand, this was a question of flexibility. Bismarck wanted to prevent a further expansion of parliamentary rights by being able to react to all possible scenarios. At the heart of this strategy was the idea of giving the constitution such 'elastic, inconspicuous, but far-reaching' structures that he

¹⁴ ['zum Schutze des Bundesgebietes und des innerhalb desselben gültigen Rechts'], ['zur Pflege der Wohlfahrt des Deutschen Volkes'] RV (1871), preamble. See also *Bundesacte* (1815), art. 2.

¹⁵ RV (1871), art. 1, 3, 6-32.

¹⁶ WSA (1820), art. 1.

¹⁷ FC (1849), § 90.

could, if necessary, devolve the union into a loose confederation or upgrade it to a centralised, greater-Prussian state.¹⁸ On the other hand, he and the princes probably deemed an explicit guarantee superfluous, because they had made monarchical sovereignty the underlying principle of the whole constitution.¹⁹

It is also not straightforward why the *Reichstag* agreed to a constitution that did not clearly determine what kind of union Germany was. The strong confederate elements of the constitution contradicted the unitary desires of the liberal majority of MPs sharply. But there was one factor that influenced their behaviour more than all political ideals or logical considerations: the fear that history might repeat itself. Memories of how the Frankfurt and Erfurt drafts had failed were still fresh, especially because some of the MPs had already been part of the revolutionary parliaments. The president of the *Reichstag*, Eduard von Simson, had held this position already in the Frankfurt Assembly and the parliament of the Erfurt Union.²⁰

Bismarck and the united governments were clever enough to exploit this historical trauma. In his first speech before the *Reichstag*, Bismarck told the parliamentarians to ‘take the lessons to heart [...] that we have drawn from the failed attempts of Frankfurt and Erfurt’.²¹ He put it even clearer in the declaration that King William read out when he opened the parliament:

If these attempts [to found a national state] have not achieved their aim, if they have enhanced rather than cured the fragmentation, because one was misled about the merit of the present by hopes and memories, about the meaning of facts by ideals, we thus acknowledge the necessity of

¹⁸ [‘elastischen, unscheinbaren, aber weitgreifenden Ausdrücken’] Bismarck in his famous *Putbusser Diktat*, 30 October 1866, quoted in Reinhart Koselleck, “Bund,” ed. Otto Brunner and Werner Conze, *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett, 1997), p. 668.

¹⁹ On this point, see Holste, *Bundesstaat im Wandel*, p. 110.

²⁰ On Simson, who later became the first president of the Imperial Court, and his role in the national assemblies, see Günther Meinhardt, *Eduard von Simson. Der Parlamentspräsident und die Reichseinigung* (Bonn: Habelt, 1981).

²¹ [‘die Lehren zu Herzen genommen haben, die wir aus den verfehlten Versuchen von Frankfurt und von Erfurt ziehen mußten’] Bismarck in the constitutive *Reichstag*, accompanying remarks to the Speech from the Throne, 24 February 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 76.

striving for the unification of the German people on the basis of facts rather than sacrificing once more what we can achieve for what we desire.²²

Warnings such as this urged the parliamentarians to restrain their demands and to adopt the constitutional draft quickly. They did not fail to have the desired effect. In the opening debate, the great fear that the creation of a national constitution might fail again became most manifest in an emotional appeal that the national liberal MP Carl Braun made to his colleagues:

Think of Frankfurt, be humble in your demands, do not demand everything at once, be content with a part, so that unlike in 1849 the whole thing will not fade away in the air like a Fata Morgana.²³

The top priority of the national liberals was therefore to make sure that this time a national state would be founded, regardless of how its constitutional arrangements might materialise in detail. Once unification was achieved, they thought, they could change the constitution according to their desires. As Georg Freiherr von Vincke, MP from Westphalia, put it:

Let us rather speak about existence. Unity and freedom are impossible without existence. What we have to make sure here is the existence of the German fatherland, first of the North German Confederation. Once we have secured this, let us continue to talk about how this will lead to unity and freedom.²⁴

²² [‘Wenn diese Bestrebungen bisher nicht zum Ziele geführt, wenn sie die Zerrissenheit, anstatt sie zu heilen, nur gesteigert haben, weil man sich durch Hoffnungen oder Erinnerungen über den Werth der Gegenwart, durch Ideale über die Bedeutung der Thatsachen täuschen ließ, so erkennen wir daraus die Nothwendigkeit, die Einigung des Deutschen Volkes an der Hand der Thatsachen zu suchen, und nicht wieder das Erreichbare dem Wünschenswerthen zu opfern’] King William I of Prussia, Speech from the Throne in the constitutive *Reichstag*, 24 February 1867, printed in *ibid.*, p. 72.

²³ [‘Denkt an Frankfurt, seid bescheiden in Euren Ansprüchen, verlangt nicht Alles auf einmal, begnügt Euch mit einem Theile, damit das ganze nicht wieder wie im Jahre 1849 als Fata Morgana in der Luft zerinne.’] Carl Braun in the constitutive *Reichstag*, session 10, 11 March 1867, printed *ibid.*, p. 154.

²⁴ [‘Wir wollen lieber von der Existenz reden. Einheit und Freiheit ist nicht möglich ohne Existenz. Was wir hier zu sichern haben, ist die Existenz der Deutschen Vaterlandes, zunächst die Existenz des Norddeutschen Bundes. Haben wir die, so lassen Sie uns weiter reden, wie er zur Einheit und zur Freiheit führt.’] Georg Freiherr von Vincke in the constitutive *Reichstag*, session 12, 13 March 1867, printed in *ibid.*, p. 304.

This perspective suggests that it is wrong to accuse the liberals – as some historians have done – of having chosen unification over freedom.²⁵ Rather, they decided to bring them about one after another, because the attempt to achieve both at the same time had failed in 1848/49. This strategy made it necessary for them to accept that for now Germany would take the form of an ill-defined federation rather than a unitary state. If one was serious about uniting Germany, the left liberal Franz Duncker maintained, it made little sense to uphold the ‘illusion’ of a unitary state. In light of the experience of Frankfurt and Erfurt, he concluded, it was perfectly acceptable to adopt a compromise, even if the constitution that resulted ‘[did] not even reach the ideal of a federal state [and] essentially [bore] the character of an alliance of independent governments’.²⁶

This attitude sanctioned a prodigious act of renunciation. It required the liberals not only to sacrifice many of their core ideals for the time being, but also to turn a blind eye to many passages of the constitution that were obviously ill-defined. For the lawyers among them in particular, this was very hard. Carl Braun, who had worked at the Wiesbaden court of appeal and was now a barrister in Berlin, made no secret of this dilemma:

The form of the draft has been criticised, and, indeed, the draft shares few similarities with what we are used to call a constitution in ordinary terms. From this perspective, [the draft] is not really correct, even less “elegant”; but what use would the most correct and elegant draft be if it remained a piece of paper, as happened to the extraordinarily correct and elegant Reich constitution of the year 1849?²⁷

²⁵ See for example Heinrich August Winkler, *Der lange Weg nach Westen*, vol. 1: Deutsche Geschichte vom Ende des Alten Reiches bis zum Untergang der Weimarer Republik, 2 vols. (Beck, 2000), chapter 4 ‘Einheit vor Freiheit’, pp. 131–265. On this view, see also Thomas Nipperdey, *Deutsche Geschichte 1866–1918*, vol. 2: Machtstaat vor der Demokratie, 2 vols. (Munich: Beck, 1991), pp. 314ff.

²⁶ [‘Illusion’], [‘nicht einmal das Ideal eines Bundesstaates erreicht, [...] sondern wesentlich nur den Charakter des Bündnisses selbständiger Regierungen trägt’] Franz Duncker in the constitutive *Reichstag*, session 12, 13 March, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 278.

²⁷ [‘Man hat auch die Form des Entwurfes getadelt, und allerdings hat der Entwurf wenig Aehnlichkeit mit dem, was wir nach gewöhnlichen Begriffen eine Constitution zu nennen pflegen. Er ist in dieser Beziehung gerade nicht correct, noch viel weniger „elegant“, allein, was würde der correcteste und eleganteste Entwurf helfen, wenn er ein Stück Papier bliebe, wie die außerordentlich correcte und elegante Reichsverfassung vom Jahre 1849 geblieben ist.’] Carl Braun in the constitutive *Reichstag*, session 10, 11 March 1867, printed in *ibid.*, pp. 150f.

Another important consequence of this attitude was that the liberals gave up their demand for the establishment of a catalogue of basic rights similar to those in the Frankfurt and Erfurt constitutions.²⁸ This decision has often been criticised as one of the quintessential shortcomings of the unification, because it contributed to delaying a proper democratisation of Germany.²⁹ But this objection needs to be assessed within the broader processual context of the constitution. The liberals decided to abandon a national basic rights catalogue not least because there was a certain degree of compensation. On the one hand, the constitution determined that some basic rights, such as the freedom of the press and the right to form associations, would be regulated by way of federal legislation.³⁰ As no federal law could be passed without the consent of the *Reichstag*, these rights were in fact constitutionally protected.

On the other hand, civil rights and political liberties were usually guaranteed by the constitutions of the states. Except for the two duchies of Mecklenburg, all of the *Länder* had adopted a basic rights catalogue either during or after the 1848 revolutions, most importantly Prussia.³¹ From a systemic perspective, Germany's federal nature thus made the inclusion of basic rights into the national constitution superfluous. The national-liberal MP Friedrich Wilhelm Grumbrecht pointed out that it would not be worth jeopardising the creation of a national state by insisting on a catalogue of rights that the constitutions of the states guaranteed anyway. Negotiations about basic rights would take a very long time, he argued, and might thus alienate the princes. For him, the lesson from 1848 was clear: 'I was a member

²⁸ FC (1849), section VI 'Die Grundrechte des deutschen Volkes', §§ 130-189. EC (1849), section VI 'Die Grundrechte des deutschen Volkes', §§ 128-187.

²⁹ On this discussion, see Konrad Remmele, "Bürgerliche Freiheit ohne verfassungsrechtliche Freiheitsverbürgungen? Zur Diskussion um das Fehlen der Grundrechte in der Verfassung des Deutschen Reiches von 1871," in *Grundrechte im 19. Jahrhundert*, ed. Gerhard Dilcher et al., Rechtshistorische Reihe 19 (Frankfurt am Main and Bern: Lang, 1982), 189-213.

³⁰ RV (1871), art. 4.16.

³¹ PC (1850), Title II 'Von den Rechten der Preußen', art. 3-42.

of the Frankfurt national assembly [...] and I know that in Frankfurt the constitutional opus failed to a large degree because of the negotiations about basic rights.’³²

Very few voices disagreed with this empirical logic. Serious objections were only raised three years later. When the *Reichstag* voted on the unification treaties in December 1870, the leader of the Catholic Centre Party, Ludwig Windthorst, claimed that the constitution made the guarantee of basic rights by the states ineffective. As the Reich rather than the *Länder* enjoyed the power to determine the allocation of competences, he argued that the former could easily deprive the latter of their right to regulate basic rights. Whatever the state constitutions determined, he concluded, they could not protect basic rights adequately.³³

Windthorst’s concerns arose primarily from the fact that in the negotiations of the unification treaties with the southern states the monarchical governments had changed the way the constitution could be amended. While the North German constitution of 1867 had required a two-third majority of all votes in the *Bundesrat* for an amendment, the 1871 constitution did not set the bar as high. The constitution could now be amended by way of ordinary legislation, without any special requirements.³⁴ This made it much easier to change the allocation of competences between the Reich and the *Länder*, because Prussia needed the support of only a few more states in order to reach a simple majority in the *Bundesrat*. From Windthorst’s perspective, the state constitutions thus no longer offered any guarantee for basic rights because the states would sooner or later lose their independent authority. If the revised constitution entered into force, he argued, ‘then the mediatisation of all German states is undoubtedly a foregone conclusion, even the mediatisation of the most powerful state,

³² [‘Ich bin Mitglied der Frankfurter National-Versammlung gewesen [...] und ich weiß, daß das Verfassungswerk in Frankfurt wesentlich mit gescheitert ist durch die Berathungen über die Grundrechte.’] Friedrich Wilhelm Grumbrecht in the constitutive *Reichstag*, session 15, 19 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 417.

³³ Ludwig Windthorst in the North German *Reichstag*, session 6, 5 December 1870, printed in Fenske, *Reichsgründung 1850-1870*, no. 129, pp. 439-41.

³⁴ NDBV (1867), art. 78. RV (1871), art. 78.

Prussia, because it is within the discretion of the federal authorities to extend their competences [...]’.³⁵

This warning points to a more general problem, namely the way in which the constitution distributed competences between the national level and the states. The only competences that the constitution defined were those of the Reich. All powers that it did not explicitly mention automatically remained with the *Länder*. But unlike the Frankfurt draft, the constitution did not make this principle of enumeration a general legal norm.³⁶ This meant that there were no limits on the right of the federal constitutional organs to expand national competences by amending the constitution.

The structural framework of the division of competences thus strongly favoured the national level. This unitary orientation of the constitution was further reinforced by the kind of competences that were conferred upon the Reich. The most important powers included the regulation of the freedom of movement, domicile and settlement affairs, all issues relating to citizenship, the customs and commercial legislation, postal and telegraphic affairs, the general administration of railways, the banking system, and the regulations of the system of coinage, weights, and measures.³⁷

All of these competences were of major importance for the regulation of the economy and society. The power of the national level over the economic market was further underlined by the fact that as the successor of the German Customs Union, the Empire was declared a uniform customs and commerce area.³⁸ These arrangements left the states with little control over the flow of people, goods, and money. This engendered sharp criticism among conservatives who tried to protect the sovereignty of the states. In the Prussian House of

³⁵ [‘dann ist unzweifelhaft die Mediatisierung aller deutschen Staaten ausgesprochen, auch die Mediatisierung des mächtigsten Staates, Preußen, denn es steht bei den Bundesautoritäten, ihre Kompetenz auszudehnen [...]’] Ludwig Windthorst in the North German *Reichstag*, session 6, 5 December 1870, printed in Fenske, *Reichsgründung*, no. 129, p. 440.

³⁶ FC (1849), § 5.

³⁷ See RV (1871), art. 4.

³⁸ Ibid, art. 33.

Lords, for example, Leopold zur Lippe-Biesterfeld-Weißfeld complained that the constitution made the federal legislature responsible for ‘matters [...] whose uniform regulation is possible only in a unitary state’.³⁹

Such conservative criticism was further fuelled by the fact that the federal competence catalogue was taken over from the revolutionary constitutions of Frankfurt and Erfurt. A comparison of the relevant articles shows impressively how all the relevant provisions of 1849 were included into the constitutions of the North German Confederation and the Empire (see Table 1). Considering this process of absorption, the unitary character of the federal division of competences is no surprise, because it had been one of the main concerns of the Frankfurt Assembly to create a uniform German political landscape.

This original motivation behind the competence catalogue contradicted Bismarck’s intention to protect the sovereignty of the states and princes. Why, then, did he include the Frankfurt provisions into the constitutional draft? He probably saw it, most importantly, as a necessary concession to the national liberals in order to garner their support for adopting the constitution. But there was also another reason. In the broader framework of the constitution, the unitary character of the competence catalogue actually supported Bismarck’s goals of expanding Prussian and protecting monarchical power. Due to the close structural connections that the constitution established between the Prussian and federal government, every competence that fell within the national remit increased the influence of Prussia over both the other states and Germany as a whole. Prussia’s hegemonic constitutional status and her role as protector of monarchical power often implied that unitary provisions actually promoted particularistic and princely interests.

The specific regulations of the different national competences went into great detail. They comprised no fewer than forty of the seventy-eight articles of the constitution. As the legal

³⁹ [‘Materien [...], deren einheitliche Regelung überhaupt nur in einem Einheitsstaate möglich ist’] Leopold zur Lippe-Biesterfeld-Weißfeld in the Prussian House of Lords, 17 November 1869, printed in Fenske, *Reichsgründung*, no. 119, p. 409.

historian Hans Boldt has pointed out, this accuracy reflected the ‘bureaucratic perfectionism’ of the administrative officers in the Prussian Ministry of Commerce who helped Bismarck draft the constitution. But the meticulousness of these provisions was also due to the fact that in a monarchical environment, the matters they regulated could often be very delicate.⁴⁰ The two traditional monarchical prerogatives of military and foreign affairs illustrate this point nicely. After the common victory in the unification wars, the constitution maintained the division of the army into individual regiments of the states.⁴¹ It also determined, however, that the forces formed ‘a single army which in war and peace is under the command of the Emperor’.⁴² These regulations represented an obvious contradiction that resulted from the attempt to respect the military sovereignty of the princes and at the same time to address the need for a centralised system of national defence.

Things looked similar in foreign affairs. In order to provide a uniform framework for the formulation of foreign policy, the constitution obliged the Emperor to ‘represent the Reich internationally, to declare war and to conclude peace in the name of the Reich, to enter into alliances and other treaties with foreign states, to credit and to receive ambassadors’.⁴³ Despite this provision, the princes maintained most of their diplomatic privileges. Many of them even continued to exchange envoys among each other and with foreign courts. Although the constitution was not clear in this point, they were allowed to do so, most lawyers agreed, as long as their diplomatic activity did not conflict with national foreign policy.⁴⁴

⁴⁰ [‘bürokratischer Perfektionismus’] Boldt, “Der Föderalismus in den Reichsverfassungen von 1849 und 1871”, p. 324.

⁴¹ RV (1871), art. 66.

⁴² [‘einheitliches Heer, welches in Krieg und Frieden unter dem Befehle des Kaisers steht’] Ibid., art. 63.

⁴³ [‘das Reich völkerrechtlich zu vertreten, im Namen des Reichs Kriege zu erklären und Frieden zu schließen, Bündnisse und andere Verträge mit fremden Staaten einzugehen, Gesandte zu beglaubigen und zu empfangen’] Ibid., art. 11.

⁴⁴ See for example: Albert Hänel, *Deutsches Staatsrecht. Die Grundlagen des deutschen Staates und die Reichsgewalt*, vol. 1, 2 vols., Systematisches Handbuch der deutschen Rechtswissenschaft 5.1 (Leipzig: Duncker & Humblot, 1892), pp. 556f.; Paul Laband, *Das Staatsrecht des Deutschen Reiches*, 5th ed., vol. 3, 4 vols. (Tübingen: Mohr, 1913), p. 3; and Curt Riess, *Auswärtige Hoheitsrechte der deutschen Einzelstaaten* (Breslau: Marcus, 1905).

The importance of this right varied greatly. While the envoys of the individual state governments in Berlin played an important role in coordinating federal politics, as the next two chapters will show, those at foreign courts were largely irrelevant. As the Bavarian lawyer Philipp Zorn put it, they were merely ‘a remnant of the German obsession with titles’.⁴⁵ Most of the princes could not afford the maintenance of diplomatic mission abroad anyway. Their willingness to pay for diplomats declined further when the first few decades after unification showed that they were politically superfluous. While in 1869 seven German states had still sent envoys to foreign courts, only Bavaria and Saxony continued this tradition after the turn of the century, with the former being represented in six European states and the latter only in the Austro-Hungarian Empire.⁴⁶ In the constitutive *Reichstag*, Johannes von Miquel, one of the leading national liberals, was therefore right when he predicted that the remaining diplomatic privileges of the princes would be of no practical significance: ‘We doubt that any parliament will be willing to squander money from the pocket of the people for useless reporters of court gossip.’⁴⁷

Nevertheless, the inclusion of such representative rights into the constitution was essential for gaining the support of the princes. The conservative MP Curt von Watzdorf underlined this fact when he warned his colleagues that the constitutional project of Erfurt had failed – among many other reasons –because it had denied the princes the right to maintain their diplomatic privileges:

But, Gentlemen, back then a whole series of trifles also played a role, and the provision of the constitution of the [Erfurt] Union that the individual governments were not allowed to send and receive permanent envoys was one issue that hurt some authorities very much and harmed the realisation of the project greatly.⁴⁸

⁴⁵ [‘Überbleibsel deutscher Titelsucht’] Quoted in Holste, *Bundesstaat*, p. 187.

⁴⁶ Ibid.

⁴⁷ [‘Wir zweifeln daran, ob irgend eine einzelne Volksvertretung geneigt sein wird, Geld hinwegzuwerfen aus der Tasche des Volkes für unnütze Berichterstatter von Hofneuigkeiten.’] Johannes von Miquel in the constitutive *Reichstag*, session 9, 9 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 107. Also quoted in Holste, *Bundesstaat*, p. 188.

⁴⁸ [‘Aber, meine Herren, es wirkte damals eine ziemlich Reihe von Kleinigkeiten auch mit, und die Bestimmung in der Unionsverfassung, daß die einzelnen Regierungen keine ständigen Gesandten empfangen

As this observation points out, the monarchical nature of the German states made the design of the federal constitution a problem as much of psychology as of law and politics.

Fiscal affairs were less a question of princely sentiment than of monarchical power. This was the only field in the division of competences between the national level and the states that greatly favoured the latter. The constitution did not introduce any direct federal taxes. Rather, it determined that the Reich had no other regular source of income but the revenues from customs duties, postal and telegraphic services, and the consumption taxes on salt, tobacco, brandy, beer, sugar, syrup, and other productions made from sugar beet.⁴⁹ Wurttemberg and Bavaria were exempted from this rule and retained their tax authority over beer and brandy as part of their special rights.⁵⁰ Given the wide scope of national competences, this small basis of direct income made it likely that the Reich would not have enough money to cover its expenses. In such cases of a federal deficit, the constitution obliged the states – which retained their right to raise any direct and indirect taxes – to subsidise the Reich. Their financial contributions, the so-called *Matrikularbeiträge*, were calculated annually in proportion to their population size.⁵¹ This fiscal system made the Reich, as Bismarck put it in the *Reichstag* in 1879, ‘an annoying boarder of the constituent states’.⁵²

The motivations behind these particularistic arrangements were complex. The lack of direct federal taxes was largely due to the fact that as Prussian Prime Minister, Bismarck had to consider the interests of the powerful East Elbian large landowners, the Junkers. As they feared an increase of taxes on ground and property, it was safer to keep the taxation of these assets in the hands of the predominantly conservative state parliaments rather than to grant it to the *Reichstag*, where the progressive electoral law of 1849 was prone to produce more

und abschicken dürften, war ein Moment, was an einzelnen Stellen sehr tief verletzte und das Eingehen in die Bestrebungen wesentlich mit schädigte.’] Curt von Watzdorf in the constitutive *Reichstag*, session 18, 23 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, pp. 619f.

⁴⁹ RV (1871), art. 38, 70.

⁵⁰ Ibid., art. 35.2.

⁵¹ Ibid., art. 70.

⁵² [‘ein lästiger Kostgänger bei den Einzelstaaten’] *Stenographische Berichte (DR)*, 1879, session 36, 2 May, p. 927.

dangerous majorities.⁵³ Moreover, a right to determine the rate of taxes would have further increased the influence of the *Reichstag* over federal finances. The traditional parliamentary power to approve the budget was its most important political leverage anyway. Keeping the Reich financially dependent on the *Länder* was a way for Bismarck to prevent the *Reichstag* from gaining an even stronger bargaining position.

For exactly this reason, the liberals in the constitutive *Reichstag* tried everything they could to broaden the independent financial basis of the Reich. At least to some degree they were successful. While the constitutional draft of the monarchical governments had limited federal legislation regarding fiscal matters to issues of customs and commerce, the *Reichstag* adopted an amendment that extended national authority to all ‘taxes that are to be applied to the requirements of the Reich’.⁵⁴ This broad provision left the door open for the evolution of a more centralised system of taxation. The most important step in that direction was that the liberals included into the constitution the possibility of introducing direct federal taxes through the backdoor. They did so by determining that the system of financial subsidies by the states would only be a temporary measure for ‘as long as Reich taxes are not introduced’.⁵⁵ In light of the political motivations behind the fiscal structures of the constitution, this amendment made it inevitable that in the evolution of the federal state taxation would become a major battleground in the confrontation between monarchical and parliamentary power. It was also clear that in this conflict, the *Reichstag* would do everything to introduce federal taxes, while the united governments would try to prevent precisely that.

⁵³ Holste, *Bundesstaat*, p. 198. See also Nipperdey, *Deutsche Geschichte 1866-1918*, vol. 2, pp. 166ff. On the importance of the Junker class in the political and economic system of the Empire more generally, see Margaret Lavinia Anderson, “Voter, Junker, Landrat, Priest: The Old Authorities and the New Franchise in Imperial Germany,” *American Historical Review* 98, no. 5 (1993): 1448–1174; Hanna Schissler, “Die Junker. Zur Sozialgeschichte und historischen Bedeutung der agrarischen Elite in Preußen,” in *Preußen im Rückblick*, ed. Hans-Jürgen Puhle and Hans-Ulrich Wehler (Göttingen: Vandenhoeck & Ruprecht, 1980), 89–122; and Cornelius Torp, “The ‘Coalition of “Rye and Iron”’ under the Pressure of Globalization: A Reinterpretation of Germany’s Political Economy before 1914,” *Central European History* 43, no. 2 (2010): 401–27.

⁵⁴ [‘die für die Zwecke des Reichs zu verwendenden Steuern’] RV (1871), art. 4.2.

⁵⁵ [‘so lange Reichssteuern nicht eingeführt sind’] Ibid., art. 70.

In addition to the particularistic arrangements of federal finances, the constitution also established a system of administration that favoured the states. This too was intended to offset the preponderance of national over state competences and thus to mitigate the influence of the *Reichstag*. Like the Frankfurt draft, the imperial constitution distinguished between the power to legislate and the power to implement laws. But it tightened this distinction between responsibilities further by giving the Reich no other powers in those fields that fell within the national remit than to adopt laws and to monitor how they were executed.⁵⁶ The actual implementation of both federal and state laws remained the exclusive responsibility of the *Länder*. Hence, the monarchical governments retained a considerable degree of control over the laws that were applicable in their states, regardless of what legislation the *Reichstag* managed to push through on the national level.

Moreover, the administrative sovereignty of the states implied that the constitution established no national agencies except in those few areas where the Reich enjoyed both legislative and administrative competences, most importantly in naval, postal, and telegraphic affairs.⁵⁷ Under the constitution, there was therefore no comprehensive body of executive departments or ministries that the *Reichstag* could try to control. The governmental agencies of the states were out of its reach anyway, as they belonged to a different level of government.

All this shows that thanks to the conflicting monarchical and parliamentary interests the regulation of national and state competences featured both a unitary and a particularistic dimension. The main structural concern of the constitution was to keep these two potentialities in balance, because otherwise neither the princely governments nor the *Reichstag* would have approved it. The range of competences that were exclusively reserved for the national level was very limited. In most areas, the legislative responsibilities of the Reich and *Länder* overlapped. Shared legislative competences were the rule rather than the

⁵⁶ Ibid., art. 4.

⁵⁷ Ibid., art. 50, 53.

exception.⁵⁸ At the same time, the particularistic tendencies of some areas were kept in check by the provision that ‘Reich laws take precedence over state laws’, a strong unitary principle that was taken over from the Frankfurt draft.⁵⁹ The superiority of the national level was further underlined by the right of the Reich to intervene in the states if they violated their federal duties.⁶⁰

This unitary-particularistic ambiguity of the distribution of competences meant that the federal state could theoretically evolve in either direction. But if we consider the nature of the competences that were conferred upon the national level, it becomes clear that a gradual centralisation of the union was very likely. The Reich enjoyed above all those competences that were necessary to create a common market. Most important were its powers over customs and commercial legislation, banking, weights and measures, the currency, intellectual property, patents, commercial and bill of exchange law, communication, and infrastructure.⁶¹ It was thus relatively clear in 1867 that ongoing industrialisation would make the Reich more powerful, because the constitution put the responsibility of regulating the most important framework conditions of the economy in its hand. This effect was further reinforced by the fact that the Reich also enjoyed the power to integrate the union socially and culturally, for example by its control over the freedom of movement, citizenship affairs, the press, and penal law.⁶² Hence, the division of competences between the states and the national level implied that it was predominantly the latter that would benefit from the dynamic development of a modern industrial economy and society. The constitution therefore made it very likely that the union would become more centralised.

This was one of the main reasons for the readiness of the economically minded liberals to drop their demand for a catalogue of basic rights and to approve the constitution. They put

⁵⁸ On this issue, see Holste, *Bundesstaat*, pp. 163f.

⁵⁹ [‘Reichsgesetze den Landesgesetzen vorgehen’] RV (1871), art. 2. FC (1849), § 66.

⁶⁰ RV (1871), art. 19. This broad provision left much room for manipulation, as Chapter 5 will demonstrate in detail.

⁶¹ Ibid., art. 4.

⁶² Ibid.

their hopes on precisely that development which Windthorst dreaded: a gradual mediatisation of the states, including Prussia, and the emergence of a unitary state, in which the national parliament would have so much power that it could easily incorporate civil rights and political liberties into the constitution by way of legislation. Friedrich Wilhelm Grumbrecht, MP for Harburg, put this view in a nutshell:

[A]nd if I consider the substance of the constitution [...], if I ignore conceptual definitions and that sort of thing, I can make no pretence of the fact that the constitutional draft, whatever name it might bear, has the purpose of creating a public entity that prepares us for a German popular unitary state.⁶³

The problem with this logic was, as the left liberal Franz Duncker warned his colleagues in March 1867, that one could not expect the monarchical governments to stay as cooperative as they currently were. Once the national enthusiasm of the unification wars ebbed away, he predicted, the governments would hardly accept a gradual centralisation that would make the *Reichstag* the centre of power. He concluded that in regard to the creation of basic rights it was wrong to rely on ‘the development of the future, the driving force of things’:

For this reason, I believe that it is indeed our duty neither to set our hope on men, nor to leave the greatest part of the work to our successors, but to put our hope on the power of institutions, and thus to arrange the constitution of the North German Confederation in a way that its institutions are [...] strong [...].⁶⁴

Such subtle voices had little chance of prevailing, given the general fear among the liberals that the creation of a constitution might fail again. In reality, there was a potentially serious systemic problem in the argument that the union would tend in the longer term to undergo

⁶³ [‘und wenn ich den Inhalt der [...] Verfassung näher prüfe, wenn ich absehe von Begriffsdefinitionen und dergleichen, so kann ich mir nicht verhehlen, daß dieser Verfassungsentwurf, welchen Namen er auch führen mag, den Zweck hat, ein Staatsgebilde zu schaffen, welches uns vorbereitet zu einem Deutschen Einheitsvolksstaate’] Friedrich Wilhelm Grumbrecht in the constitutive *Reichstag*, session 12, 13 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 307.

⁶⁴ [‘die Entwicklung der Zukunft, die treibende Kraft der Dinge’], [‘Darum glaube ich, ist es allerdings unsere Pflicht, unsere Hoffnungen nicht zu setzen auf Männer, noch weniger unseren Nachfolgern den größten Theil der Arbeit zu überlassen, sondern unsere Hoffnungen zu setzen auf die Kraft der Institutionen, und darum diese Verfassung des Norddeutschen Bundes so einzurichten, daß die Institutionen in demselben [...] stark sind [...].’] Franz Duncker in the constitutive *Reichstag*, session 12, 13 March 1867, printed in *ibid.*, pp. 284f.

centralisation. Unlike the Frankfurt draft, the imperial constitution did not require the states and the national level to have the same kind of governmental system, meaning either monarchical or parliamentary government.⁶⁵ This lack of a homogeneity requirement implied that if the *Reichstag* gained much more power because of a general centralisation of the union while the states maintained the constitutional status quo, it would be likely that the different levels of government would lose coordination, with the Reich changing into a parliamentary system and the *Länder* remaining monarchical. The liberals did not seem to care about this problem. Secretly, they probably even endorsed it. Due to the provisions that national laws took precedence over state laws and that the federal constitutional organs could amend the constitution by way of ordinary legislation, a possible lack of coordination between the states and the Reich threatened the monarchical state governments most of all.

This inherent risk of the constitution is not without irony, because the lack of a homogeneity requirement was actually intended to preserve monarchical power. Bismarck did not include such a clause into his draft – as we will see in the context of the analysis of later constitutional disputes in Chapter 5 – because he did not want to provide the *Reichstag* with any mechanism that it could use to foster parliamentary government in the states, for example by requiring them to introduce the progressive electoral law already operative at the national level. The likelihood of a gradual centralisation of the union made this safeguard all the more important from his perspective. Moreover, a legal requirement seemed superfluous at the time of unification because the coordination of the *Länder* and the Reich was guaranteed by the homogeneity of their executive elites. The three republican city-states Hamburg, Bremen, and Lübeck did not weaken this anchor of stability, because their electoral laws were so restrictive that they were ruled by a quasi-aristocratic elite of Hanseatic merchants.⁶⁶

⁶⁵ FC (1849), § 186.

⁶⁶ On the lack of an homogeneity requirement, see Holste, *Bundesstaat*, pp. 143f. and Kurt Niding, *Das Prinzip der Homogenität in den Verfassungen des Deutschen Reiches von 1849, 1871 und 1919 unter besonderer Berücksichtigung des Artikels 17 der geltenden Reichsverfassung* (Gotha: Seitz, 1926).

But there was no guarantee that this homogeneity of elites would persist. On the contrary: a centralisation of the union would greatly undermine it, most importantly because a more powerful *Reichstag* might try to staff the national government with parliamentarians. From this point of view, the unitary predisposition of the federal competence catalogue made a loss of coordination between the states and the Reich likely. The constitution did not provide a structural framework that could protect the union from gradually imploding in case the confrontation between monarchical and parliamentary power should intensify and render the compromise of the unification era obsolete.

Reich

In the relations between the states and the Reich, the struggle between monarchical and parliamentary interests depended on the division of competences. The crucial question on the national level was, in contrast, where among the organs of federal government the constitution defined the seat of power. What role in federal government did the constitution assign to the *Bundesrat*, the *Reichstag*, the Emperor, and the Chancellor? This question requires us to survey their different functions in relation to each other.

In the constitutive *Reichstag*, the powers and relations of the different federal constitutional organs were discussed in great depth. The historian Heinrich von Sybel, who served as MP for the national liberals, pointed out that ‘the creation of a viable central authority for Germany’ was ‘perhaps the most difficult problem any statesman had to face in this century’. The key problem was to find a constitutional arrangement that granted the national parliament enough participation to satisfy the liberals without compromising the monarchical sovereignty of the princes. The constitutional projects of Frankfurt and Erfurt

had failed precisely because they did not manage to solve this problem. ‘In light of these experiences’, Sybel concluded, the imperial constitution ‘has left well-trodden paths’.⁶⁷

The new approach of the constitution was most obvious in how it defined the centre of federal government around which the operations of all other organs revolved. Unlike in the Frankfurt and Erfurt draft, this role was not conferred upon the parliament or the Emperor. Neither was it – as some historians have claimed – bestowed upon the Chancellor.⁶⁸ Rather, the pivot of the constitution was the *Bundesrat*. Its powers spanned all three branches of government. Together with the *Reichstag*, it formed the federal legislature. Before entering into force, most bills were approved by the *Bundesrat* twice: in a first session after one of the state governments had introduced it and, if the *Reichstag* demanded amendments, in a second following the parliamentary negotiations.⁶⁹

The *Bundesrat* was also the central executive organ. It enjoyed many traditional monarchical prerogatives that the Frankfurt draft had bestowed upon the Emperor, such as the right to decree administrative ordinances necessary for the implementation of federal laws, the power to adjudicate defects in how federal laws were executed, and the right to intervene in constituent states if they failed to fulfil their federal duties.⁷⁰

Finally, the *Bundesrat* also held a central position in the judiciary. Unlike the drafts of Frankfurt and Erfurt, the constitution did not establish a federal constitutional court.⁷¹ The responsibility for dispute settlement among the states fell to the *Bundesrat*, which in this respect resembled the *Bundestag* of the German Confederation.⁷² The close reference to the

⁶⁷ [‘das schwierigste Problem, welches im Laufe dieses Jahrhunderts irgend einem Staatsmanne sich entgegengestellt hat’], [‘durch diese Erfahrungen [...] die viel betretenen Straßen vollständig verlassen’] Heinrich von Sybel in the constitutive *Reichstag*, session 18, 23 March 1867, Bezold/Holtzendorff, *Materialien*, vol. 1, pp. 581f.

⁶⁸ See for example Hans-Peter Ullmann, *Das Deutsche Kaiserreich 1871-1918*, Neue Historische Bibliothek edition suhrkamp 546 (Frankfurt am Main: Suhrkamp, 1995), p. 33 and Hans-Ulrich Wehler, *Deutsche Gesellschaftsgeschichte*, vol. 3, 5 vols. (Munich: Beck, 1987ff.), p. 357.

⁶⁹ RV (1871), art. 5, 7.

⁷⁰ Ibid., art. 7, 19. FC (1849), §§ 54, 80, 82.

⁷¹ FC (1849), section V ‘Das Reichsgericht’, §§ 125-129. EC (1849), section V ‘Das Reichsgericht’, §§ 123-127. The consequences that flowed from the lack of a constitutional court will be the subject of Chapter 5.

⁷² RV (1871), art. 76.

judicial structures of the Confederation was most obvious in the verbatim adoption of the provisions of the Vienna Final Act regarding what the council of states had to do when the judicial organs of a state refused to deal with a legal matter that fell within their remit.⁷³

It is easy to see why Bismarck preferred the *Bundesrat* to address cases of constitutional conflict. For him, it was not an option – as Chapter 5 will discuss – to establish an independent constitutional court similar to the *Reichsgericht* of the Frankfurt and Erfurt constitutions, a court that could intervene in the political struggle between monarchical and parliamentary power and possibly take sides with the latter. Why, however, did his constitutional draft designate the *Bundesrat* as the central executive organ rather than the Emperor or the Chancellor, an office that he would assume himself? The main reason was that the status of the *Bundesrat* guaranteed that the federal executive could not be made responsible to the *Reichstag*. In other words, it prevented the introduction of parliamentary government.

The *Bundesrat* was a collective council of the twenty-five state governments, to which they sent their plenipotentiaries in order to participate in the decision-making process of the national level. With reference to the total number of plenipotentiaries in the North German Confederation, Bismarck called the *Bundesrat* a ‘government front bench with forty-three seats’.⁷⁴ As this collective executive was composed of envoys who were accountable to their home governments in the states and who thus did not belong to the federal level of government it could not be held responsible by the national parliament. This made the *Bundesrat* in national politics the central protective device of monarchical interest. Bismarck stressed this emphatically when the demands of the liberals to introduce parliamentary government became louder and louder in the 1880s:

⁷³ Ibid., art. 77. WSA (1820), art. 29.

⁷⁴ [‘43 Plätze umfassende Ministerbank’] Bismarck in his *Putbusser Diktat* ‘Unmaßgebliche Ansichten über Bundesverfassung’, 19 November 1866, printed in Fenske, *Reichsgründung*, no. 100, p. 342.

I see the preservation of the federal state as a much better protection against the republican offence [...] than a centralised state where only one government rather than a multitude of governments faces the *Reichstag*.⁷⁵

In the constitutive *Reichstag* of 1867, the left liberals criticised this anti-parliamentary function of the *Bundesrat* sharply. Hermann Schulze-Delitzsch, for example, complained that ‘such a collegial executive, in which the representatives of the German dynasties have the word, prevents the introduction of responsible governmental organs at the top of the union categorically’ and thus ‘opens the door [...] for absolutism’.⁷⁶ In order to create parliamentarily responsible ministries, he therefore demanded that the competences of the *Bundesrat* should be limited to the legislature. This could happen, his left-liberal colleague Benedict Waldeck suggested, by transferring all executive powers to the Emperor who on that basis could appoint federal ministers that would be responsible to the *Reichstag*.⁷⁷

As he wanted to prevent this scenario, Bismarck rejected all proposals to transform the *Bundesrat*. Particularly fierce was his resistance to suggestions oriented towards changing the council of states into an ordinary upper house of a bicameral legislature, with the *Reichstag* forming the lower chamber. Such an arrangement, he believed, would complicate the machinery of federal government greatly and would pave the way for a centralisation of the union that would make the emergence of parliamentary government likely.⁷⁸

Interestingly, one of the arguments of the supporters of a bicameral system was that it was precisely the absence of a proper upper house that would result in a change of the form of government. In the parliamentary debate on the unification treaties in December 1870, Ludwig Windthorst predicted that the *Reichstag* – if left on its own – would get into conflict

⁷⁵ [‘In der Erhaltung des Föderativ-Staats erblicke ich eine viel größere Widerstandsfähigkeit gegen das republikanische Andrängen, [...] als sie dem Einheitsstaate zu Gebote stehen würde, wo nur eine einzige Regierung, nicht eine Mehrheit von Regierungen, dem *Reichstage* gegenüber stehen würde.’] Quoted in Poschinger, *Bundesrat*, vol. 4, p. 165.

⁷⁶ [‘eine solche collegialische Executive, in der den Vertretern der einzelnen Deutschen Dynastien ein Wort zusteht, hindert absolut die Einsetzung verantwortlicher Regierungs-Organen an der Spitze des Bundes’], [‘dem Absolutismus [...] die Thüren geöffnet’] Hermann Schulze-Delitzsch in the constitutive *Reichstag*, session 11, 12 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, pp. 207f.

⁷⁷ Benedict Waldeck in the constitutive *Reichstag*, session 20, 27 March 1867, printed in *ibid.*, p. 742.

⁷⁸ See Bismarck’s *Putbusser Diktat* ‘Unmaßgebliche Ansichten über Bundesverfassung’, 19 November 1866, printed in Fenske, *Reichsgründung*, no. 100, p. 343.

with the states. 'From this friction', he argued, 'either absolutism or the republic will eventually emerge'.⁷⁹ Bismarck did not see such a risk, because he understood the *Bundesrat* as the guarantor of the status quo. In 1874, he wrote to the Bavarian king that 'at present Germany has in the institution of the *Bundesrat* [...] a solid guarantee against any radicalisation or exaggeration of unitary efforts'.⁸⁰

As soon as contemporaries heard the name 'Bundesrat', it was clear to them that this organ was a safeguard of princely interest. In contrast to the prefix 'Reich', 'Bund' had a confederate connotation that suggested that the council of states was the forum of a league of princes. This is why Bismarck vehemently opposed proposals to change its name into 'Reichsrat'.⁸¹ In fact, when the southern states joined the union in 1870/71 he even contemplated giving it the name 'Bundestag'. Only after the Prussian Crown Prince had condemned this explicit reference to the central organ of the hated German Confederation did Bismarck drop this idea.⁸²

But the new label did not change the fact that the *Bundesrat* was very closely modelled on its confederate predecessor. In the constitutive *Reichstag*, Benedict Waldeck posed the rhetorical question: 'This *Bundesrat*, what is it then? A reproduction of the German *Bundesacte*.'⁸³ Just as in the Confederation, the state governments participated in the decision-making process of the union via a permanent congress of envoys. This was a German confederate tradition that dated as far back as the Imperial Diet of the Holy Roman

⁷⁹ ['aus dieser Reibung wird schließlich der Absolutismus oder die Republik unzweifelhaft hervorgehen'] Ludwig Windthorst in the North German *Reichstag*, session 6, 5 December 1870, printed in *ibid.*, no. 129, p. 441f.

⁸⁰ ['Deutschland hat gegenwärtig in der Institution seines Bundesrathes [...] eine feste Bürgschaft gegen jede Ausartung oder Uebertreibung der einheitlichen Bestrebungen.'] Bismarck's letter to King Ludwig II of Bavaria, 10 August 1874, printed in *Gesammelte Werke*, vol. 2, no. 125, p. 182.

⁸¹ Bismarck's letter to Kaiser William I, 29 March 1871, printed in *ibid.*, no. 25, pp. 22f.

⁸² Otto Becker, *Bismarcks Ringen um Deutschlands Gestaltung*, ed. Alexander Scharff (Heidelberg: Quelle & Meyer, 1958), pp. 288f.

⁸³ ['Dieser Bundesrat, was ist er denn? Eine Reproduktion der Deutschen Bundesacte.'] Benedict Waldeck in the constitutive *Reichstag*, session 18, 23 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 598.

Empire. Bismarck revived this arrangement because it preserved the sovereignty of the princes as well as possible in a federal state.

The constitution also adopted from the Confederation the distribution of votes in the council of states, with one essential difference: in 1867, the votes of those states that Prussia had annexed the previous summer – Hannover, Nassau, Hesse-Kassel, and the Free City of Frankfurt – were added to the Prussian vote, a practice that the Vienna Final Act had explicitly forbidden.⁸⁴ The distribution of votes in the *Bundesrat* thus reflected Prussia's dominance in the unification process. After the admission of the southern states, there were fifty-eight votes in total, with Prussia accounting for seventeen, Bavaria for six, Saxony and Wurttemberg for four each, Baden and Hesse for three each, and each of the remaining states for one.⁸⁵

This distribution of votes gave Prussia a quantitative supremacy in the council of states that she had enjoyed neither in the Confederation nor in the draft of the Frankfurt Assembly. As Bismarck noted, 'the danger that in important questions [...] the Prussian government will be [...] in the minority is not likely'.⁸⁶ It was this overwhelming dominance in the central organ of federal government that was the basis of Prussia's constitutional hegemony. This implied that the Prussian cabinet would dominate federal government for as long as it would retain control over its *Bundesrat* plenipotentiaries.

But it is important to keep things in perspective. The constitution did not make Prussia's dominance in the *Bundesrat* as great as it could have been. The *Bundesacte* of 1815 based the number of votes that the states enjoyed on the size of their population.⁸⁷ As the population grew constantly over the course of the century, in particular in urban areas – of which most

⁸⁴ WSA (1820), art. 6.

⁸⁵ RV (1871), art. 6. On the adoption of the distribution of votes from the *Bundestag* of the Confederation, see Bismarck's *Putbuser Diktat* 'Unmaßgebliche Ansichten über Bundesverfassung', 19 November 1866, printed in Fenske, *Reichsgründung*, no. 100, p. 341.

⁸⁶ ['Die Gefahr, daß die preußische Regierung in erheblichen Fragen [...] in die Minorität geriete, ist [...] nicht wahrscheinlich.'] Bismarck in his *Putbuser Diktat* 'Unmaßgebliche Ansichten über Bundesverfassung', 19 November 1866, printed in Fenske, *Reichsgründung*, no. 100, p. 341f.

⁸⁷ *Bundesacte* (1815), art. 6.

lay in Prussia – the ratio of population size to number of votes had become extremely disproportionate by 1867. By refraining from adjusting the distribution of votes, Bismarck heavily favoured the small states. As Prussia had a population of about 24 700 000 at the time of unification, she would have been entitled to no less than 772 votes, considering that Schaumburg-Lippe, with 32 000 people the smallest state, enjoyed one vote.⁸⁸ Such a ratio of votes, Bismarck noted, ‘would have muzzled the other governments[...] completely’.⁸⁹ For the same reason, the constitution gave each member of the *Bundesrat* the right to speak in the *Reichstag*, even if his view differed from that of the majority of state governments.⁹⁰ All these arrangements demonstrate that the central motivation behind the internal structures of the *Bundesrat* was not to make Prussia as dominant as possible, but to preserve the sovereignty of the princes.

As this construction principle strengthened the sense of solidarity among the monarchical governments, it also supported the way the *Bundesrat* shielded the federal executive from the *Reichstag*. Despite this anti-parliamentary function, the overwhelming majority of the liberals in the constitutive *Reichstag* eventually adopted the provisions that Bismarck’s constitutional draft had proposed regarding the *Bundesrat*. The main reason for this approval was that the constitution also granted to the national parliament a relatively strong position that had great evolutionary potential. On the one hand, the elevated status of the parliament was due to the adoption of the progressive electoral law of the Frankfurt Assembly.⁹¹ The broad franchise that it established would make it very hard for the federal executive to ignore permanently the popular demands that the *Reichstag* would articulate.

⁸⁸ Population numbers are taken from Hubert Kiesewetter, *Industrielle Revolution in Deutschland: Regionen als Wachstumsmotoren* (Stuttgart: Steiner, 2004), p. 126.

⁸⁹ [‘die übrigen Regierungen [...] vollständig mundtot gemacht würden’] Bismarck in his *Putzuser Diktat* ‘Unmaßgebliche Ansichten über Bundesverfassung’, 19 November 1866, printed in Fenske, *Reichsgründung*, no. 100, p. 341f.

⁹⁰ RV (1871), art. 9.

⁹¹ Ibid., art. 20.

On the other hand, the parliament had a pivotal role in the legislative process. Just like the state governments in the *Bundesrat*, the *Reichstag* had the right to propose laws.⁹² Moreover, it could forward petitions to the *Bundesrat* and the Chancellor.⁹³ Most importantly, however, no law could be passed without parliamentary consent, including the budgetary laws.⁹⁴ Without the cooperation of the *Reichstag*, it was therefore impossible to govern the union. This was perhaps the greatest concession that Bismarck had to make to the liberals in order to generate support for his unification policy.

These arrangements of the legislative process had profound implications for federal evolution. In light of the distribution of competences between the Reich and the states, the pending economic, legal, and social integration of the new union made it likely that the national level would gain a great number of competences. This automatically implied that the power of the *Reichstag* would increase, because its help was needed to adopt the legislation necessary to regulate the process of domestic integration. Every new national competence meant that the *Reichstag* gained influence vis-à-vis the monarchical state governments. In this sense, a future expansion of parliamentary power was inbuilt into the constitution. When they negotiated the organisation of federal authority, the liberals were well aware of this long-term factor. Heinrich von Sybel, for example, stressed that it was

a great advantage of this draft that it [...] does not define the competences of the individual forces too anxiously, in too much detail, but that it leaves a lot of room for the dynamic, productive evolution, the future, and the joint effort of the cooperating forces.⁹⁵

This consideration suggests that the liberals adopted the structural arrangements of Bismarck's draft not least because they were optimistic that the future evolution of the union

⁹² Ibid., art. 23.

⁹³ Ibid.

⁹⁴ Ibid., art. 5.

⁹⁵ ['einen großen Vorzug des Entwurfs, daß er [...] die Kompetenzen der einzelnen Kräfte nicht zu ängstlich, nicht zu detailliert abgrenzt, sondern der lebendigen, productiven Entwicklung, der Zukunft und dem gemeinsamen Wirken der verbundenen Kräfte einen breiten Spielraum gestattet.'] Heinrich von Sybel in the constitutive *Reichstag*, session 18, 23 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 584.

would offset the anti-parliamentary function of the *Bundesrat* by gradually giving preponderance to the *Reichstag*.

But this hope was of course no guarantee. This is why the liberals continued to insist on the introduction of parliamentarily responsible federal ministries. In the way of this demand, however, there stood a fundamental problem: the constitution did not establish any federal government at all. The federal executive was formed not by a government in the conventional sense, but by the *Bundesrat*. There was neither a prime minister nor a ministerial apparatus under the constitution. The efforts of the liberals thus concentrated on trying to turn the rudimentary structures of the national administration created by the constitution into a proper ministerial system that – in future – could be made subject to parliamentary control.

The head of the federal administration was the Emperor. As such, he appointed, inaugurated, and dismissed all federal officials, including the Chancellor.⁹⁶ Moreover, he monitored the implementation of federal laws by the state governments and reported deficiencies to the *Bundesrat*, which then decided upon the countermeasures that he had to put into action.⁹⁷ In addition, he possessed many other executive powers that corresponded to those of the Kaiser under the Frankfurt constitution: as we saw earlier, he represented Germany internationally, declared war and concluded peace, entered into treaties with foreign countries, accredited and received ambassadors, and summoned, opened, prorogued, and closed both the *Bundesrat* and the *Reichstag*.⁹⁸

Yet, he lacked many core monarchical powers that the Kaiser of the Frankfurt draft had enjoyed. The general right to decree administrative ordinances rested with the *Bundesrat*.⁹⁹ In the legislature, he did not enjoy any substantial powers at all. The constitution restricted his role to promulgating and publishing federal laws.¹⁰⁰ In particular, he lacked a legislative veto

⁹⁶ RV (1871), art. 15, 18.

⁹⁷ Ibid., art. 7.1.3, 17, 19.

⁹⁸ Ibid., art. 11.

⁹⁹ Ibid., art. 7.2. Compare FC (1849), § 80.

¹⁰⁰ RV (1871), art. 17.

and the right to introduce bills, two traditional monarchical prerogatives.¹⁰¹ Moreover, he did not have the right automatically to assume all powers that were not explicitly conferred upon one of the other federal organs.¹⁰²

The Emperor was therefore not a constitutional monarch.¹⁰³ This was perhaps most obvious in that his only honorary right was the title ‘Deutscher Kaiser’, which the constitution conferred upon the King of Prussia in his capacity as holder of the Federal Presidency.¹⁰⁴ But the imperial title did not turn the institution into a monarchical office. For the liberals, this was a serious problem. Their demand to create responsible ministries only made sense in a constitutional monarchy. Heinrich von Sybel explained this complicated matter in simple words:

Our draft does not establish a constitutional monarchy; it does not create a monarchical holder of the highest state function, the legislature. I do not understand how one can speak on this basis about the possibility of ministerial responsibility. [...] How do you want to imagine a juristically responsible ministry, which officially cannot exercise any influence on the formation of laws? In a constitutional monarchy, it is the monarch that appears as the source of legislation, and his responsible servants, the ministers, have the crucial influence on the direction of legislation. [...] But here, in our draft, Gentlemen, there is no such reciprocal relationship. Legislation is made by the *Bundesrat* and the *Reichstag*.¹⁰⁵

Sybel concluded that in order to introduce responsible federal ministries it was first necessary to make the Prussian King ‘the source and holder of the legislative power’ of the union.¹⁰⁶ As the Prussian king automatically assumed the office of the Emperor, this reform would have

¹⁰¹ Compare FC (1849), §§ 80, 101.

¹⁰² Compare FC (1849), §, 84.

¹⁰³ On this issue, see Oliver F. R. Haardt, “The Kaiser in the Federal State (1871-1918),” *German History* 34, no. 4 (2016), pp. 529-554, especially p. 538f. The article can be found in the appendix of this thesis.

¹⁰⁴ RV (1871), art. 11.1.

¹⁰⁵ [‘Unser Entwurf giebt uns keine constitutionelle Monarchie; er hat keinen monarchischen Träger der höchsten Staatsfunction, der Legislative. Ich verstehe nicht, wie man auf diesem Boden überhaupt von der Möglichkeit einer Ministerverantwortlichkeit reden soll. [...] Wie wollen Sie sich ein im juristischen Sinne verantwortliches Ministerium denken, welches auf die Entstehung der Gesetze officiell nich den mindesten Einfluß nehmen kann? In der constitutionellen Monarchie ist es der Monarch, der als Quelle der Gesetzgebung erscheint, und seine verantwortlichen Diener, die Minister, haben thatsächlich den entscheidenden Einfluß auf die Richtung der Gesetzgebung. [...] Hier aber, in unserem Entwurfe, meine Herren, ist von einem solchen Wechselverhältnis gar keine Rede. Die Gesetzgebung wird gemacht vom Bundesrathe und vom Reichstage. ’] Heinrich von Sybel in the constitutive *Reichstag*, session 18, 23 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 589.

¹⁰⁶ [‘Quell und Inhaber der gesetzgebenden Gewalt’] *Ibid.*, p. 590.

made the Kaiser a proper constitutional monarch, who could have appointed responsible ministers.

This line of argument points to the fact that the head of union appeared in the constitution in several different capacities, namely as Prussian king, Emperor, and supreme commander. In other words, the single most important person in the executive held three different offices. There were two main reasons for this. On the one hand, in addition to the numerical dominance in the *Bundesrat* the personal union between the Prussian and imperial crown formed the basis for Prussia's constitutional hegemony. This dominance was further buttressed by the privileges that the Prussian king enjoyed in the *Bundesrat* in comparison to the other princes. The Prussian government did not only decide in the event of a tied vote, but it could also veto any bill that intended to change the status quo of certain consumption taxes, customs duties, and military and naval affairs.¹⁰⁷ All of these provisions were additional safety mechanisms that Bismarck incorporated into the constitution in order to guarantee that Germany could not be governed against the will of the Prussian government.¹⁰⁸

On the other hand, the division of powers between the three most important executive offices was an essential element of Bismarck's attempt to create structural conditions that prevented the introduction of federal ministries. This strategy becomes most clear in military affairs, because here all three offices overlapped. The Kaiser was the supreme commander of both the army and the navy.¹⁰⁹ But as the constitution preserved the military sovereignty of the princes by maintaining the division of the army into individual regiments, this office was part of the Prussian rather than imperial crown.¹¹⁰ This was manifest in the provision that all administrative military ordinances by the Prussian king were automatically binding for the

¹⁰⁷ RV (1871), art. 5, 35, 37.

¹⁰⁸ See Bismarck's *Putbusser Diktat* 'Unmaßgebliche Ansichten über Bundesverfassung', 19 November 1866, printed in Fenske, *Reichsgründung*, no. 100, p. 341f.

¹⁰⁹ RV (1871), art. 53.1, 63.1.

¹¹⁰ *Ibid.*, art. 66.

regiments of the other states too.¹¹¹ These arrangements implied that the *Reichstag* had no control over the supreme commander, because he did not belong to the national, but to the Prussian level of government. It was impossible to create a federal ministry of war that could be made accountable to the parliament.

For this reason, some liberals condemned the organisation of military and naval affairs as ‘Roman imperialism’ and ‘military dictatorship of the worst kind’.¹¹² Things were made worse, from their perspective, by the fact that they failed to make the military budget subject to annual parliamentary control. After a fierce controversy, they agreed with Bismarck on the compromise that after four years a federal law should reassess the peacetime size of the army and the costs it involved.¹¹³ In order to compensate for this loss of budgetary control, they demanded that the fragmentation of the highest executive offices be resolved through transfer of all federal powers vested in the Prussian king to the institution of the Emperor. This, they argued, would at least allow for the ‘possibility of accountable ministers and responsible government in all areas of government’.¹¹⁴ As long as the complex conglomerate of executive powers existed, it was impossible to establish any clear accountability.

But as Bismarck opposed any changes to the constitutional status of the Emperor and the Prussian king vehemently, the liberals eventually gave up the idea of introducing an array of responsible ministries. Instead, they refocused their quest for ministerial responsibility on the only national administrative office that the constitution established apart from the Emperor: the Chancellor.

Rudolph von Delbrück, who became the first president of the Federal Department of the Chancellor, the *Kanzleramt*, in August 1867, described in his memoirs how Bismarck had

¹¹¹ Ibid., art. 63.5.

¹¹² [‘römische Imperatorenthum’] [‘Militärdictatur der schroffsten Art’] Benedict Waldeck (left liberal) and Friedrich Wilhelm Grumbrecht (national liberal) in the constitutive *Reichstag*, session 12 and 20, 13 and 27 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, pp. 308, 740.

¹¹³ RV (1871), art. 62. On this issue, see Huber, *Verfassungsgeschichte*, vol. 3, pp. 663f.

¹¹⁴ [‘Möglichkeit verantwortlicher Minister und verantwortlicher Regierung nach allen Seiten’] Hermann Schulze-Delitzsch in the constitutive *Reichstag*, session 18, 23 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 626.

originally envisaged the position of the Chancellor. The constitutional draft gave him no other role but that of a chairman of the *Bundesrat*, who received instructions from the Prussian foreign minister. This position was modelled on the presidential envoy of the *Bundestag* in the German Confederation, who had acted on the command of the Austrian foreign minister. The function of the Chancellor was to help the Federal Presidency – the Emperor and Prussian king – to deal with the *Bundesrat*, for example by organising majorities or preparing legislative proposals. But it was unclear how the Chancellor was supposed to do this, as the draft – like the constitution that was eventually adopted – did not establish any federal bureaucracy. Delbrück speculated that it had probably been Bismarck's plan to turn the *Bundesrat* committees into larger administrative offices that could support him. From Bismarck's perspective, this would have had the great advantage that there would have been no need for any independent ministries that might have been susceptible to becoming responsible to the parliament.¹¹⁵

But things turned out differently. The constitutive *Reichstag* changed the status of the Chancellor completely by adopting an amendment to article 17 that Rudolf von Bennigsen, one of the leaders of the national liberals, had proposed. The Lex Bennigsen made the Chancellor responsible for all official acts of the Emperor by way of countersignature. This transformed his role from that of a presidential envoy into the only responsible minister of the Reich. In fact, it gave him a position very similar to that of the federal ministers in the Frankfurt draft. They too had been supposed to countersign the acts of the Kaiser.¹¹⁶ As Delbrück pointed out, this new position implied that the Chancellor could no longer rely on the *Bundesrat* committees alone. Since his duties now spanned all areas over which the

¹¹⁵ Martin Friedrich Rudolph von Delbrück, *Lebenserinnerungen von Rudolph von Delbrück, 1817-1867: mit einem Nachtrag aus dem Jahre 1870* (Leipzig: Duncker & Humblot, 1905), p. 399. On Bismarck's original plan, see also Rudolf Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, Neue Münstersche Beiträge zur Geschichtsforschung 3 (Münster: Aschendorff, 1957), especially pp. 24, 28ff. and Heinrich Otto Meisner, "Bundesrat, Bundeskanzler und Bundeskanzleramt (1867-1871)," in *Moderne deutsche Verfassungsgeschichte (1815-1914)*, ed. Ernst-Wolfgang Böckenförde, 2nd ed., Neue Wissenschaftliche Bibliothek Geschichte 51 (Königsstein: Athenäum, 1981), especially p. 81.

¹¹⁶ FC (1849), §§. 73.2, 74.

Emperor presided as head of the federal administration, it was inevitable that a number of proper federal administrative agencies would evolve that could help him to prepare bills, to draft ordinances, and to monitor the implementation of federal laws in the states.¹¹⁷

The Lex Bennigsen did not, however, establish parliamentary government, because it did not define the responsibility of the Chancellor in any specific terms. In particular, it did not create a juristic responsibility that the parliament could claim in court. The Chancellor was therefore not accountable to the *Reichstag*. What kind of responsibility did he have, then? After fierce controversy in the constitutive *Reichstag*, the liberals left this question more or less open, as otherwise Bismarck and the united governments would not have accepted the amendment. If anything, Heinrich von Sybel noted, the Lex Bennigsen established a general accountability of the Chancellor to public opinion. Most liberals eventually accepted this rather vague definition, because they believed that in light of the pivotal position of the *Reichstag* in the federal legislature, it would be impossible in the longer run to govern Germany against the demands of public opinion. As Sybel put it: ‘Under modern conditions no government can thrive that does not survive the judgment of *this* court in the length of time.’¹¹⁸

Indeed, it was very unlikely at the time of unification that the Chancellor would risk a permanent standstill of federal government by refusing to cooperate with the *Reichstag*. There was simply too much to do. The entire domestic integration of the union needed to be addressed by way of federal legislation, not least in regard to economic and military affairs, which were vital for Germany’s international security. In light of these circumstances, only a few MPs rejected the Lex Bennigsen as a matter of principle. Most outspoken among them were some left liberals, such as Hermann Schulze-Delitzsch: ‘But, Gentlemen, to base this

¹¹⁷ Delbrück, *Lebenserinnerungen*, pp. 399f.

¹¹⁸ [‘Keiner Regierung hat in den modernen Verhältnissen Bestand, die auf Dauer vor dem Ausspruch *dieses* Gerichtes nicht besteht.’] Heinrich von Sybel, session 18, 23 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, p. 592-4, quote on p. 593.

matter in a constitutional state on a moral responsibility rather than a juristic one: – well, if you want to do that, then we do not need a constitution at all, Gentlemen!’¹¹⁹

This harsh criticism points to one of the reasons why Bismarck accepted the Lex Bennigsen: it seemed relatively harmless, in particular if one considers how the negotiations in the constitutive *Reichstag* had evolved. The liberals had shown convincingly that Bismarck was wrong in arguing that responsible federal ministries were incompatible with a federal organisation of the Empire. As the left-liberal MP Albert von Carlowitz put it, it was simply not true ‘that you steer toward a unitary state only because you want ministerial responsibility’.¹²⁰ Due to the prevalence of such views, there was a serious risk that the *Reichstag* would propose to make the Chancellor directly responsible to the parliament. From Bismarck’s perspective, the Lex Bennigsen was therefore far from being the worst possible outcome of the parliamentary negotiations.

Moreover, he also understood it as a lesser evil in comparison to the introduction of a whole set of federal ministries. He despised all collegial systems of government wholeheartedly because of his experience as Prussian prime and foreign minister. In the Prussian cabinet, the so-called State Ministry, he quarrelled with the other ministers all the time, because decisions were taken by majority vote. Since he wanted to avoid a similar nuisance on the national level, he tried all he could to preserve the independence of the Chancellor from other federal executives.¹²¹

Furthermore, Bismarck realised that despite all the complications, the *Lex Bennigsen* created an advantage for the Chancellor, because it strengthened his position vis-à-vis the

¹¹⁹ [‘Aber, meine Herren, in dem constitutionellen Staate auf diese moralische Verantwortlichkeit die Sache zu gründen und von der juristischen absehen: – ja, wenn man das thun will, dann braucht man überhaupt keine Constitution, meine verehrten Herren!'] Hermann Schluze-Delitzsch in the constitutive *Reichstag*, session 18, 23 March 1867, printed in *ibid.*, p. 623.

¹²⁰ [‘daß man auf den Einheitsstaat lossteuere, wenn man überhaupt die Ministerverantwortlichkeit wolle’] Albert von Carlowitz in the constitutive *Reichstag*, session 19, 26 March 1867, printed in *ibid.*, p. 705.

¹²¹ Otto Becker, *Bismarcks Ringen um Deutschlands Gestaltung*, 243ff. On Bismarck’s contempt for and cooperation with the Prussian State Ministry more generally, see Helma Brunck, *Bismarck und das preussische Staatsministerium 1862-1890*, Quellen und Forschungen zur brandenburgischen und preussischen Geschichte 25 (Berlin: Duncker & Humblot, 2004), especially the overview on pp. 312-17.

Emperor. In case they disagreed, the Chancellor could use his accountability to public opinion as leverage, for example if he refused to countersign one of the Emperor's official acts. The *Lex Bennigsen* thus broadened the Chancellor's scope of action within the federal executive considerably.¹²²

But the main reason why Bismarck was willing to accept the *Lex Bennigsen* was probably that it left the most important structural arrangement for the protection of monarchical power untouched. It was somewhat irrelevant that the Chancellor was made subject to a general responsibility, because he was not the centre of the executive that faced the *Reichstag* in the legislative process. This role fell to the *Bundesrat*. Even if the constitutive *Reichstag* had made the Chancellor directly accountable to the parliament, the *Bundesrat* would have continued to protect the federal executive from parliamentary influence to some degree. In order to guarantee that this anti-parliamentary structure would stay permanently intact, Bismarck included in the constitution a clause of incompatibility stipulating that no one could be a member of both the *Reichstag* and the *Bundesrat* at the same time.¹²³

Why, then, did the great majority of the liberals decide to adopt the *Lex Bennigsen* instead of risking a conflict with Bismarck and the united governments about proper ministerial responsibility? Fears that the creation of the constitution could fail at the last moment, similar to the attempts at Frankfurt and Erfurt, did play an important role. But the liberals were also motivated by an optimistic vision of the future. Their great hope was that the pending domestic integration of Germany would trigger a great process of centralisation. The unitary predisposition of the federal competence catalogue, which they had adopted just before the discussion on the organisation of the constitutional organs, nourished this hope. Like Rudolph von Delbrück, they expected that a centralisation of the union would go hand in hand with the emergence of federal administrative agencies around the Chancellor. This ministerial

¹²² Becker, *Bismarcks Ringen um Deutschlands Gestaltung*, pp. 388f. Boldt, "Der Föderalismus in den Reichsverfassungen von 1849 und 1871", p. 330.

¹²³ RV (1871), art. 9.

apparatus, they speculated, would gradually replace the *Bundesrat* as the centre of federal government and thus dissolve the key constitutional arrangement that protected the executive from parliamentary influence. Over the course of this development, the *Reichstag* could try to turn the newly emerged federal administration into a parliamentarily responsible body. This way, the liberals would eventually get what they had always wanted: responsible federal ministries.

The problem with this logic was that the constitution left it completely open in what direction the union would evolve. It was deeply ambiguous, embracing unitary and confederate as well as parliamentary and monarchical elements. Moreover, it did not define any limits to federal evolution. It was therefore not a stable legal framework that made the future development of the union in any sense predictable. If federal ministries emerged, they could as well serve as the basis for a new absolute regime rather than for parliamentary government.

This ambiguity and open-endedness of the constitution was mainly due to the fact that it was a new combination of those structural elements that had shaped the conflict between monarchical and parliamentary power since the beginning of the nineteenth century. For the evolution of the imperial federal state, this composite character of the constitution was a great burden, because it meant that the basic structural framework of Germany not only lacked any greater coherence, but was also burdened by the historical legacy of its predecessors.

Table 1: List of National Competences in the Federal Constitutions of 1849, 1867, and 1871

| Subject Matter | 1849 Draft Constitution of the Frankfurt Assembly | 1849 Draft Constitution of the Erfurt Union | 1867 Constitution of the North German Confederation | 1871 Constitution of Imperial Germany |
|--|--|---|--|--|
| Freedom of movement, domicile and settlement affairs, right of citizenship, passport and police regulations for aliens, transacting business including insurance affairs | §§ 58, 57, 39, 136 | §§ 56, 55, 39, 134 | art. 4.1 | art. 4.1 |
| Customs and commercial legislation, taxes that are applied to the requirements of the Reich | §§ 34, 38, 51 | §§ 34, 38, 49 | art. 4.2 | art. 4.2 |
| System of coinage, weights, and measures, establishment of the principles for the issues of funded and unfunded paper money | §§ 46, 45, 47 | §§ 45, 44, 46 | art. 4.3 | art. 4.3 |
| General regulations as to banking | § 47 | § 46 | art. 4.4 | art. 4.4 |
| Granting of patents for inventions, protection of intellectual property | § 40 | § 40 | art. 4.5, 4.6 | art. 4.5, 4.6 |
| Organisation of the common protection of German commerce in foreign countries, of German vessels and their flags at sea; arrangement of a common consular representation | §§ 38, 6 | §§ 38, 6 | art. 4.7 | art. 4.7 |
| Railway affairs; construction of land and water communications for the defence of the country and for general transport | §§ 28, 32, 31 | §§ 28, 32, 31 | art. 4.8 | art. 4.8, 4.6 |
| Rafting and navigation affairs on waterways belonging in common to several of the States; condition of the waterways; river or other water dues | §§ 24, 25 | §§ 24, 25 | art. 4.9 | art. 4.9 |
| Postal and telegraphic affairs | §§ 41, 44 | §§ 41, 43 | art. 4.10 | art. 4.10, 52 |
| Regulations as to the reciprocal execution of judgments in civil affairs; settlement of requisitions in general | § 183 | § 181 | art. 4.11 | art. 4.11 |
| Regulations as to the verification of public documents | § 60 | § 58 | art. 4.12 | art. 4.12 |
| General legislation as to obligatory rights, penal law, commercial and bill of exchange laws, and judicial procedure | § 64 | § 61 | art. 4.13 | art. 4.13 |
| Military and naval affairs of the union | § 13 | § 13 | art. 4.14 | art. 4.14 |
| Measures of medicinal and veterinary police | § 61 | § 59 | art. 4.15 | art. 4.15 |
| Regulations for the press and for associations | § 143.4 | § 141.3 | --- | art. 4.16 |

Based on: FC (1849); EC (1849); NDBV (1867); RV (1871); Ernst Bezold, ed., *Alphabetisches Sprech- und Sach-Register nebst zwei Congruenz-Registern zu der Verfassung des Norddeutschen Bundes und der Deutschen Reichsverfassung, sowie zu den Verhandlungen und Verträgen der verbündeten norddeutschen und beziehungsweise der süddeutschen Regierungen und den Reichstags- beziehungsweise Landtags-Verhandlungen* (Berlin: Habel, 1873), pp. 5f.; and Holste, *Bundesstaat*, pp. 110f., fn., 57.

CHAPTER III GOVERNMENT

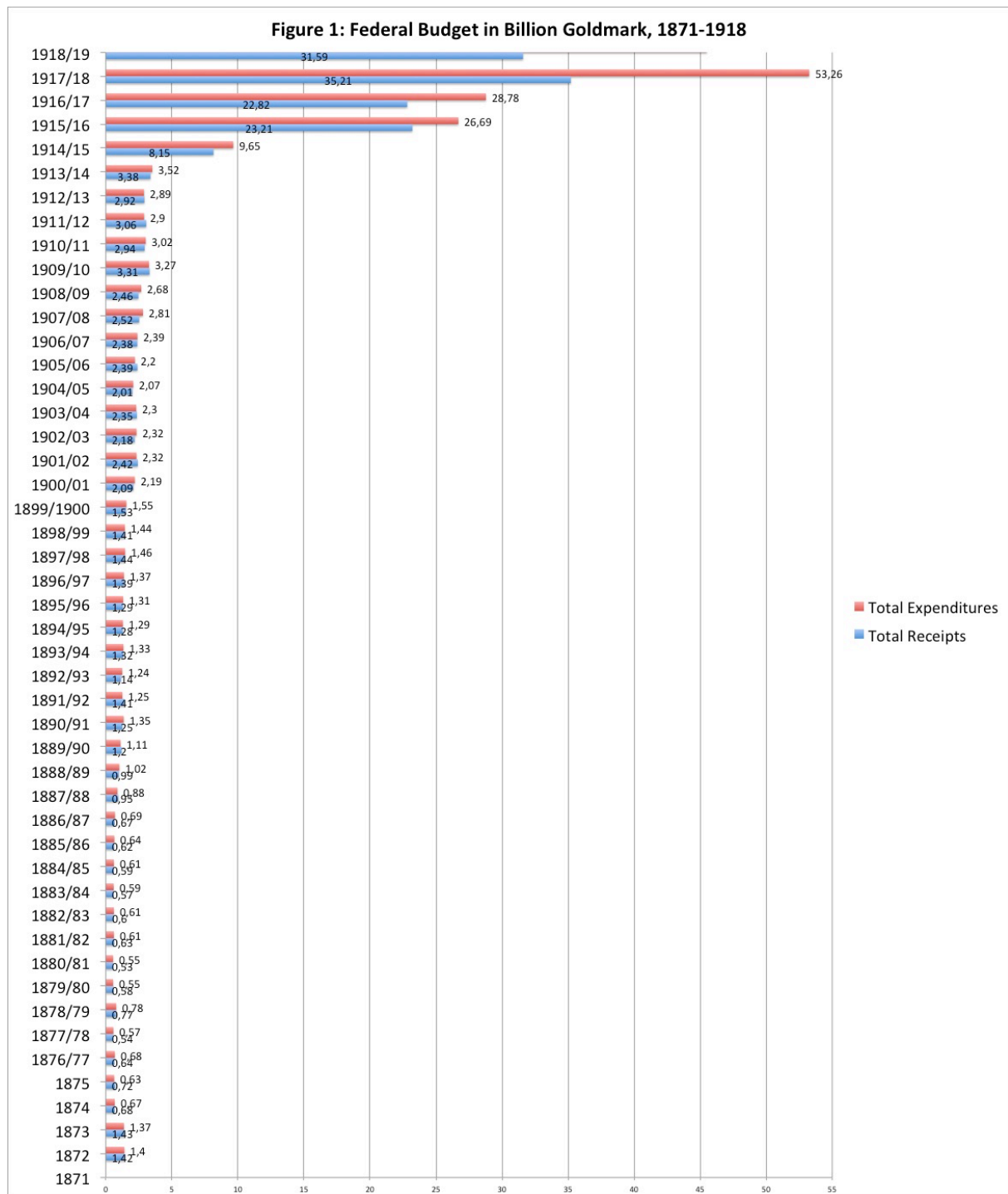


Figure 1: Federal Budget in Billion Goldmark, 1871-1918. Based on Kaiserliches Statistisches Amt, ed. *Statistisches Jahrbuch für das Deutsche Reich* (Berlin: Puttkammer & Mühlbrecht, 1880-1918). Available online at *Das Deutsche Digitale Zeitschriftenarchiv*, <https://www.digizeitschriften.de/dms/toc/?PID=PPN514401303> (first retrieved February 2015).

Over the course of the imperial era, federal government changed completely. While the Empire had been founded as a decentralised federation, it gradually evolved into a centralised state. More clearly than anywhere else, this transformation was reflected in the development of the national budget (see Figure 1). In the first decade after unification, both expenditures and receipts actually decreased, from around 1.4 billion Goldmark in 1872 to half a billion in 1880/81. This decline was largely due to the military demobilisation and the end of the French reparation payments after the unification wars. For a nation of the size of Imperial Germany, the national budget of these early years was strikingly small. Its low level reflected the financial dependence of the Reich on the states, which funded the national level by a complex system of subsidy payments. After the end of the 1870s, however, there was a clear trend toward centralisation. Between 1880 and 1914, expenditures and receipts gradually grew from 500 million to more than three billion. This rise flowed from the ever-increasing national remit and the growing number of funds that the Reich generated independently from the states. Following the outbreak of the First World War, this process of centralisation reached a new level. In 1917/18, national expenditures and receipts skyrocketed to an all-time high of over fifty and thirty billion, respectively. The budget exploded because wartime Germany had practically become a unitary state that centralised all its resources on the national level.

What did this transformation of the Empire from a federal into a centralised state look like? How did the relations evolve between the Reich and the states on the one hand and among the federal constitutional organs on the other? In short: what changes did federal government undergo and what were the underlying dynamics? This chapter will demonstrate that the states were gradually marginalised by a newly emerged national government around the Chancellor. As a consequence of this concentration of power, the anti-parliamentary structures of the federal order dissolved and the national executive became dependent on the *Reichstag*, which replaced the *Bundesrat* as the central organ of national decision-making.

The main feature of this development, from the unification until the wartime collapse of the monarchy, was systemic instability. To a large extent, this instability was due to the fact that the constitution established neither mediating organs with the power to resolve disputes in a negotiated and – if possible – consensual way nor proper forums of communication in which the most important decision-makers of federal government could have coordinated their policies. A constitutional court did not exist. Until 1917, there was no cabinet in which the Chancellor and the state secretaries could have conferred with each other. The plenary assembly of the *Bundesrat* was no setting for an open debate between the state governments, because the plenipotentiaries were bound by the instructions of their home governments. Direct relations between the *Reichstag* and the federal executive were not provided for by the constitution at all.

This lack of coordinating institutions was an important part of Bismarck's attempt to protect monarchical power. Soon after the adoption of the constitution, however, it turned out that the union could not be governed without any exchange between the state governments, the federal administration, and the *Reichstag*. For this reason, a number of auxiliary practices evolved over the years: the state governments conferred with each other via their diplomatic missions; the highest-ranking federal executives became part of the Prussian cabinet, the State Ministry; and the federal administration and the *Reichstag* negotiated in the parliamentary committees.

While these informal practices kept the machinery of federal government running, they also produced new problems, such as frictions between the federal and Prussian administration. Moreover, they could be abandoned at any time. The Wilhelmine Chancellors, for example, discontinued Bismarck's policy of including the state governments in important decisions of national government. It was most problematic, however, that the newly evolved governmental practices did not manage to balance monarchical and parliamentary interests. While the *Reichstag* gradually moved to the centre of national decision-making, the state

governments were pushed to the margins. As a result, the complex system of federal government lost coordination and eventually imploded.

The changes that took place in the functions of the federal constitutional organs and in the competences of the Reich and the states were of such weight that historians have long made them a subject of research. Several studies have analysed how the roles of the *Bundesrat*, the *Reichstag*, and the administration around the Chancellor changed over time.¹ The participation of the most important states in federal politics – Bavaria, Württemberg, and Baden – has also been examined.² Due to Prussia's hegemonic status, the relationship between the Prussian and national executive has received special attention.³ These studies on individual problems notwithstanding, historians have not so far scrutinised how federal government evolved in its entirety.

This neglect is probably due to the fact that such an analysis must avoid two potential pitfalls. On the one hand, it must refrain from framing a priori the evolution of federal government in terms of the two dichotomies that have dominated historical writing on the Empire's federal structures: nationalism vs particularism; and Borussification vs mediatisation, meaning the question of whether Prussia ruled the Reich or vice versa. If we allow these dichotomies to frame the investigation, we automatically classify our observations

¹ See for example Binder, *Reich*; Walther Peter Fuchs, "Bundesstaaten und Reich: Der Bundesrat," in *Zur Problematik "Preußen und das Reich,"* ed. Oswald Hauser, Neue Forschungen zur brandenburg-preussischen Geschichte 4 (Cologne: Böhlau, 1984), 83–104; Holste, *Bundesstaat*, pp. 201–30; Huber, *Verfassungsgeschichte*, vol. 3, pp. 809–907 and vol. 4, pp. 129–347; and Manfred Rauh's two studies *Föderalismus* and *Parlamentarisierung*.

² On Bavaria, see Binder, *Reich*; Rauh, *Föderalismus*; and Rauh, *Parlamentarisierung*. On Württemberg, see Binder's study and Georg Helmut Kleine, *Der württembergische Ministerpräsident Freiherr von Mittnacht*, Veröffentlichungen der Kommission für geschichtliche Landeskunde in Baden-Württemberg 50 (Stuttgart: Kohlhammer, 1961). On Baden, see Hans Klaus Reichert, *Baden am Bundesrat 1871 bis 1890* (Heidelberg: Berenz, 1966) and Walther Peter Fuchs' source collection *Großherzog Friedrich I. von Baden und die Reichspolitik 1871–1917*, 4 vols., Veröffentlichungen der Kommission für geschichtliche Landeskunde in Baden-Württemberg 15, 24, 31, 32 (Stuttgart: Kohlhammer, 1968).

³ See in particular the collection of essays in Oswald Hauser, ed., *Zur Problematik "Preußen und das Reich,"* Neue Forschungen zur brandenburg-preussischen Geschichte 4 (Cologne: Böhlau, 1984); Kersten Rosenau's study *Hegemonie und Dualismus. Preußens staatsrechtliche Stellung im Deutschen Reich*, Verfassungsgeschichte der Neuzeit. Studien zur Deutschen Verfassungsgeschichte (Regensburg: Roderer, 1986); and the source collection printed in Goldschmidt, *Kampf*.

under one of the four rubrics, thus obstructing from view a range of developments that cannot be captured by any of them.

On the other hand, an analysis of forty-seven years of federal government in a union of twenty-five states must find a way to deal with the plethora of information that the records of the different federal organs and the various actors on the national and state level provide. It is crucial to find a conceptual vessel that steers clear of the Scylla of a superabundance of details without being sucked down into the Charybdis of overgeneralisation and abstractness. This does not mean saddling the enquiry with external criteria. Rather, by establishing the structural conditions for federal evolution, the constitution itself can tell us where we should direct our attention.

First, the constitution determined that the states participated in federal decision-making in the *Bundesrat*. A study of federal government must therefore consider how wide a scope for action the *Bundesrat* granted the state governments in practice and in how far they became active in national politics beyond this institutional framework.⁴ This need not mean charting the activities of every individual state in the decision-making processes of the Reich; as we shall see in this chapter and the next, the middling and small states can for most purposes be considered as one group that cooperated and competed with Prussia, the federal administration, and the *Reichstag*.

Second, in order to protect the power of the monarchical governments, the constitution established no national government and made the *Bundesrat* the central organ of the executive and legislature. The evolution of federal government thus greatly depended on how the role of the *Bundesrat* developed and on who assumed the ministerial tasks of preparing and implementing laws. These are issues of central importance to any analysis of how the functionality of the federal constitutional organs developed over time.

⁴ On the importance of the informal influence of the states, see Paul Hähnel, Philipp Höfer, and Julia Liedloff, “Föderale Mitbestimmung im Deutschen Kaiserreich - Der Einfluss der Länder auf die Reichsgesetzgebung,” in *Föderalismus in historisch vergleichender Perspektive*, ed. Gerold Ambrosius, Christian Henrich-Franke, and Cornelius Neusch, vol. 2 (Baden-Baden: Nomos, 2015), 101–34.

Third, the power of the *Reichstag* depended greatly on the division of competences between the national level and the states. The more competences the national level assumed, the more influential was the federal parliament, because its consent was required for the adoption of every federal law, including the annual budget. In order to chart the evolution of federal government, it is therefore necessary to chart the development of the federal remit by looking at what legislative powers the Reich – and thus the *Reichstag* – gained over the years in comparison to the states.

Fourth, it makes sense to pay special attention to how fiscal affairs developed. The constitution protected monarchical power by making the Reich financially dependent on subsidies from the states, because this system minimised the leverage that the *Reichstag* had by virtue of its budgetary powers. The conflict between the monarchical governments and the parliament thus depended not least on whether the latter would manage to introduce direct federal taxes. Finally, a look at the development of national finances will also help us better to understand the relationship between the Prussian and federal executives. As long as subsidies by the states remained the main source of income for the Reich, the Prussian cabinet had a major influence on federal government, simply because Prussia was by far the greatest payer.⁵

In examining these issues, this chapter can draw on a rich body of literature. What it has to do in order to compose a comprehensive narrative of federal government is to bring the different threads together and to reconsider the sources that historians have rendered accessible in a new light. For this purpose, it will look at federal government as a dynamic network of constantly changing relationships between the Reich, Prussia, and the other states

⁵ On the fiscal system of the union, see Julia Cholet, *Der Etat des Deutschen Reiches in der Bismarckzeit* (Berlin: Berliner Wissenschafts-Verlag, 2012); Hans-Peter Ullmann, *Der deutsche Steuerstaat. Geschichte der öffentlichen Finanzen* (Munich: Beck, 2005), part 2; and Peter-Christian Witt, “Finanzen und Politik im Bundesstaat - Deutschland 1871-1933,” in *Föderalismus in Deutschland*, ed. Jochen Huhn and Peter-Christian Witt (Baden-Baden: Nomos, 1992), 75–99. For a legal perspective, see Stefan Koriath, *Der Finanzausgleich zwischen Bund und Ländern*, Jus Publicum 23 (Tübingen: Mohr Siebeck, 1997), pp. 309-24 and Jürgen W. Hiden, *Der bundesstaatliche Finanzausgleich in Deutschland: geschichtliche und staatsrechtliche Grundlagen* (Baden-Baden: Nomos, 1999). For a good contemporary analysis, see Wilhelm Gerloff, *Matrikularbeiträge und direkte Reichssteuern* (Berlin: Simion, 1908).

on the one hand and between the *Reichstag*, the *Bundesrat*, and the federal administration on the other.⁶

By adopting this mode of analysis, this chapter wants to add a new perspective to the debate about the parliamentarisation of the Empire. At the centre of this controversy is the work by Manfred Rauh, who has argued that over the course of the Wilhemine era the *Reichstag* managed to make the national executive dependent on it, even though there was no official constitutional reform. For this subtle change toward a parliamentary system he has coined the term ‘silent parliamentarisation’.⁷

Since Rauh published his theory in the 1970s, it has become subject to manifold criticism. Political and social historians such as Dieter Langewiesche have criticised the theory on the basis that it focuses solely on the institutional level. In the Empire, they argue, German society never underwent a democratisation strong enough to support the emergence of parliamentary government.⁸ More recently, this argument has been turned around. Christoph Schönberger has maintained that democratisation was stronger than parliamentarisation and thus obstructed it in its development.⁹ Both of these arguments dismiss the view that before the outbreak of the war Germany was on the verge of introducing parliamentary government. Thomas Kühne put this opinion, which now dominates the debate on the evolutionary potential of the Empire’s constitutional system, in a nutshell. ‘The thesis of [...] “silent” parliamentarisation’, he criticised, ‘is the product of unhistorical wishful thinking’.¹⁰

⁶ The powers of the Emperor changed so much in the context of federal evolution that I have published an article on this hitherto neglected topic, which can be found in the appendix: Oliver F. R. Haardt, “The Kaiser in the Federal State (1871-1918),” *German History* 34, no. 4 (2016): 529-54. This chapter will briefly summarise the main findings of the article. The book that will grow out of this thesis will use the article as the basis for an additional chapter on ‘Monarchy’ (see Introduction).

⁷ [‘stille Parlamentarisierung’] Rauh, *Föderalismus* and Rauh, *Parlamentarisierung*. Rauh’s view is a further development of the interpretation first advanced by Werner Fraundienst, “Demokratisierung des deutschen Konstitutionalismus in der Zeit Wilhelms II.,” *Zeitschrift für die gesamte Staatswissenschaft* 113 (1957): 721-46.

⁸ Dieter Langewiesche, “Das Deutsche Kaiserreich - Bemerkungen zur Diskussion über Parlamentarisierung und Demokratisierung Deutschlands,” *Archiv für Sozialgeschichte* 19 (1979): 628-42.

⁹ Christoph Schönberger, “Die überholte Parlamentarisierung. Einflußgewinn und fehlende Herrschaftsfähigkeit des Reichstags im sich demokratisierenden Kaiserreich,” *HZ* 272, no. 3 (2001): 623-66.

¹⁰ [‘Die These von der [...] „stillen“ Parlamentarisierung ist Produkt eines unhistorischen Wunschenkens [...]’] Thomas Kühne, “Demokratisierung und Parlamentarisierung: Neue Forschungen zur politischen

It is striking that in this debate only Rauh has considered the federal dimension of the Empire a central factor of the constitutional development. He has argued that after Bismarck had left office the system of Prussian hegemony disintegrated and that the *Reichstag* used this opportunity to make the national government around the Chancellor dependent on it. Most other contributors to the parliamentarisation debate have either treated Germany's federal structures as a side issue or have ignored them completely. This way, the development of the Empire's form of government has been severed from the evolution of its federal system. As a result, the parliamentarisation debate lacks a coherent view on Germany's governing institutions and their structural framework.¹¹

This chapter wants to overcome this fragmentation by linking the functional evolution of the federal constitutional organs to a matter that even Rauh has largely neglected, namely the changing distribution of competences between the national level and the states. First, it will look at the period of Bismarck's Chancellorship, in which federal government was shaped by the cooperation of the monarchical state governments. Then, it will turn to the Wilhelmine era and demonstrate how the newly established ministerial bureaucracy of the Reich took control over national policy-making while it became more and more dependent on the *Reichstag*. After that, the chapter will close with some brief interpretative reflections on the parliamentarisation debate.

Over the course of this analysis, this chapter will argue that Germany changed from a federal union in which the monarchical governments determined the course of federal government into a unitary system that was governed jointly by the national administration around the Chancellor and the *Reichstag*. In other words: the centralisation that set in

Entwicklungsfähigkeit Deutschlands vor dem Ersten Weltkrieg," *Geschichte und Gesellschaft* 31, no. 2 (2005), pp. 315f.

¹¹ On this issue, see Marcus Kreuzer, "Parliamentarization and the Question of German Exceptionalism: 1867-1918," *Central European History* 36, no. 3 (2003): 327-57. Kreuzer argues that the fragmentation of the historiographical debate is related to the dominance of an exceptionalist view on the German constitutional development, which holds that 'the Reichstag's limited and arrested parliamentarisation set Germany apart from European countries and constituted a key factor in Weimar's collapse', quote on p. 328.

immediately after the adoption of the constitution went hand in hand with the demise of monarchical and the rise of parliamentary government.

The Twilight of Monarchical Government (1867-1890)

After the adoption of the constitution in 1867, Bismarck's agenda for federal government was twofold. His main concern was to prevent the establishment of parliamentarily responsible federal ministries. In order to make the machinery of federal government function, he also made great efforts to bring the Prussian State Ministry, in which decisions were taken by majority vote among the ministers, under his control. Against the threats of Prussian particularism and the introduction of responsible ministries, Bismarck tried to employ the collective power of the princes. During his chancellorship, national decision-making was therefore shaped by a close cooperation of the state governments.

Between 1867 and 1879, Bismarck pursued his objectives by centralising the developing national administration under the *Kanzleramt*, the Federal Department of the Chancellor. When this system led to the emergence of a growing number of federal departments and thus encouraged rather than obstructed demands for the introduction of responsible ministers, he changed his strategy. Until he left office in 1890, he adopted a wide range of measures that were supposed to reduce the responsibilities of the Chancellor, to restrain the independence of the newly established departments, and to reinvigorate the *Bundesrat* as the principal antagonist of the *Reichstag*. But even Bismarck could not turn back the clock and restore the confederate structures of the unification era. The federal system had developed its own dynamic towards centralisation that made inevitable the demise of the power of the monarchical governments.

I. Administrative Centralism: The Coordination of Domestic Integration by the *Kanzleramt* and the Emergence of Federal Departments (1867-1879)

By adopting the Lex Bennigsen, the constitutive *Reichstag* turned the Chancellor – as we have seen in the previous chapter – into the only responsible minister of the Reich. In this position, he needed the support of a central administrative agency that could help him prepare bills, draft ordinances, and monitor the implementation of federal laws in the states. For this purpose, the *Kanzleramt* was founded in August 1867.¹² It was directly responsible to the Chancellor and featured a central office, the *Zentralbehörde*, which supervised a gradually increasing number of directorates. At the beginning, there were three of these subdivisions, which dealt with consular, postal, and telegraphic affairs, respectively.¹³

During the first years of its existence, the *Kanzleramt* greatly relied on the staff and administrative structures of the Prussian ministries. But the national administration quickly developed a life of its own. This became most manifest in the practice of presidential proposals. The governments of the middling and small states lacked both the expertise and the resources necessary to address the economic, legal, and social integration of the young union. Most of the relevant laws were therefore prepared either by the Prussian ministries or the *Kanzleramt*. But the latter faced the problem that it could not introduce draft bills into the legislative process, because the constitution reserved this right to the state governments and the *Reichstag*.¹⁴ Out of this lacuna evolved the customary right of the Emperor – the head of the federal administration – to introduce bills into the *Bundesrat*. He usually did so via the Prussian bench. Over the late 1860s, more and more of these so-called presidential proposals

¹² *Allerhöchster Präsidial-Erlaß, betreffend die Errichtung des Bundeskanzler-Amtes*, 12 August 1867, BGBl. NDB (1867), no. 3, p. 29. On the creation of this institution, see the memoirs of its first president Martin Friedrich Rudolph von Delbrück, *Lebenserinnerungen von Rudolph von Delbrück, 1817-1867: mit einem Nachtrag aus dem Jahre 1870* (Leipzig: Duncker & Humblot, 1905), pp. 399-401.

¹³ Rudolf Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, Neue Münstersche Beiträge zur Geschichtsforschung 3 (Münster: Aschendorff, 1957), pp. 28ff., 36.

¹⁴ RV (1871), art. 7, 23.

were prepared in the *Kanzleramt*, rather than in the Prussian ministries, as had previously been the norm. Already by the time the southern states joined the union in 1871, presidential proposals had become the rule rather than the exception. This gave the *Kanzleramt* the opportunity to extend its competences into all fields of legislation, including the national budget.¹⁵

At the same time, presidential proposals implied a loss of Prussian control over federal policy making. As the *Kanzleramt* took over more and more competences and staff from the Prussian ministries, it slowly began to replace them as the most important administrative institution of the union. In a letter to his home government, the Saxon envoy Richard von Koenneritz concluded as early as September 1867 that the union, ‘rather than bringing about the desired expansion of the [Prussian] ministries, will deprive them of a good deal of their importance and prestige’. High-ranking Prussian executives, he reported, already started complaining: ‘This Bismarck will ruin the whole Prussian state for us!’¹⁶

The governments of the middling and small states welcomed this development, because the *Kanzleramt* tended to take their interests more into account than the Prussian ministries did. This was not least due to Rudolph von Delbrück, its first president. The professional Prussian bureaucrat, a liberal expert on commerce, managed the *Kanzleramt* as a ‘collective ministry of the united governments’, as the historian Heinrich Otto Meisner has called it.¹⁷ Delbrück not only usually chaired the meetings of the plenary assembly of the *Bundesrat*. He also saw to it that the *Kanzleramt* provided the *Bundesrat* with administrative staff. Moreover, under

¹⁵ On the practice of presidential proposals, see Haardt, “The Kaiser in the Federal State (1871-1918)”, pp. 539-42 and Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, pp. 52, 310.

¹⁶ [‘anstatt diesen Ministerien die verhoffte Erweiterung zu bringen, denselben gar noch ein gutes Teil von ihrer Bedeutung und ihrem Nimbus abzunehmen im Begriff steht’], [‘Der Bismarck ruiniert uns noch den ganzen preußischen Staat!’] Richard von Koenneritz in a letter to the Saxon Foreign Ministry, 25 September 1867, printed in Goldschmidt, *Kampf*, no. 3, pp. 138f.

¹⁷ [‘Gesamtministerium der verbündeten Regierungen’] Heinrich Otto Meisner, “Bundesrat, Bundeskanzler und Bundeskanzleramt (1867-1871),” in *Moderne deutsche Verfassungsgeschichte (1815-1914)*, ed. Ernst-Wolfgang Böckenförde, 2nd ed., Neue Wissenschaftliche Bibliothek Geschichte 51 (Königsstein: Athenäum, 1981), p. 88.

his supervision the *Kanzleramt* prepared legislative bills in close cooperation with the *Bundesrat* committees.¹⁸

Most of the time, the *Kanzleramt* began consulting the state governments even before legislative proposals were introduced into the committees. This consultation took place via the diplomatic missions of the states in Berlin, a practice that greatly eroded the ministerial function of the *Bundesrat* committees, which shifted more and more to the *Kanzleramt*. The plenary assembly of the *Bundesrat* did not play any active role in the negotiation process, but merely voted on bills that the state governments and the *Kanzleramt* had previously agreed upon.¹⁹

The great advantage of making use of the diplomatic missions was that the state envoys could engage in a more open exchange among each other and with the *Kanzleramt* than in the plenary assembly of the *Bundesrat*, where the plenipotentiaries were bound by the instructions of their home governments. But the shift of political decision-making from the *Bundesrat* to a forum outside the official constitutional framework implied that the state governments depended on the willingness of the Chancellor and the national administration to hear them and to take their interests into account. This worked well enough for as long as there was at least a partial overlap of interests. But whenever a serious conflict arose between the state governments and Bismarck, such as in 1878 over the introduction of a tobacco tax, he did not hesitate to threaten that Prussia would dissolve the union, annex the other states, and create a unitary German-Prussian state. With reference to his famous remark in the constitutive *Reichstag*, he made clear that ‘then one could build a monument for the German

¹⁸ Unfortunately, there is no comprehensive biographical study of Delbrück (1817-1903), even though his *Lebenserinnerungen* are an incredibly rich source on the transformation of the Prussian and German state between the pre-March era and the late 1870s. For a short, but good overview of his life see Marko Kreutzmann, *Die höheren Beamten des Deutschen Zollvereins: eine bürokratische Funktionselite zwischen einzelstaatlichen Interessen und zwischenstaatlicher Integration (1834-1871)* (Göttingen: Vandenhoeck & Ruprecht, 2012), p. 248f.

¹⁹ Binder, *Reich*, p. 188. Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, pp. 51ff.

Empire and place an inscription on there: “It was put into the saddle, but it did not know how to ride.”²⁰

Most of the time, however, Bismarck made great efforts to accommodate the wishes of the state governments, because he wanted to unite their powers against the *Reichstag*. The ‘careful consideration of the sensitivities of the other constituent states’ was so central to his approach to federal government that he coined an own term for it: ‘Bundesfreundlichkeit’ or federal good will.²¹ His commitment to this principle became obvious, for example, when he dismissed the idea of merging the federal with the Prussian judicial administration in 1878 with one single comment: ‘If we are going to do everything that’s constitutionally possible, let’s do Greater Prussia instead of Germany and the others can go to blazes!’²²

The great importance that Bismarck assigned to *Bundesfreundlichkeit* gave the state governments a profound influence over federal government. This was perhaps most obvious in the framing process of the 1878 Proxy Law.²³ The constantly increasing federal remit meant that the Chancellor was obliged to delegate his responsibility to countersign laws and ordinances to functional substitutes. At the beginning, the President of the *Kanzleramt* took over this responsibility for all fields of legislation. But after the *Kanzleramt* had been split into several administrative agencies, the *Reichsämtler* (see below), this practice could not be

²⁰ [‘Man könne dann dem Deutschen Reiche ein Denkmal errichten und darauf die Inschrift setzen: „In den Sattel hat man ihm geholfen, aber zu reiten verstand es nicht.“’] Reported by the Baden envoy Hans von Türkheim in a letter to the President of the Baden State Ministry Ludwig Karl Friedrich von Turban, 12 January 1879, printed in Goldschmidt, *Kampf*, no. 60, p. 244. For Bismarck’s speech in the constitutive *Reichstag*, session 10, 11 March 1867, where he made his famous remark ‘Let us put Germany [...] into the saddle! It will know how to ride.’ [‘Setzen wir Deutschland [...] in den Sattel! Reiten wird es schon können.’], see Bezold/Holtzendorff, *Materialien*, vol. 1, p. 181.

²¹ [‘die sorgfältig geschonte Empfindlichkeit der übrigen Bundesstaaten’] Bismarck in a letter to the vice-president of the Prussian State Ministry Otto zu Stolberg-Wernigerode, 5 November 1879, printed in Goldschmidt, *Kampf*, no. 71, p. 269. For a concrete example of Bismarck’s usage of the term, see for example his remarks on the discussion of a railway reform in the Prussian House of Representatives, 28 April 1876, printed in Alfred von der Leyen, *Die Eisenbahnpolitik des Fürsten Bismarck* (Berlin: Springer, 1914), pp. 211f. On the principle of *Bundesfreundlichkeit*, see Binder, *Reich*, pp. 181ff.

²² [‘Wenn wir alles thun was in der Richtung staatsrechtlich zulässig ist so machen wir Groß-Preußen statt Deutschland und stoßen die anderen vor den Kopf!’] Marginal note by Bismarck in a memorandum prepared by the Prussian minister of justice Heinrich von Friedberg, 2 November 1879, printed in Goldschmidt, *Kampf*, no. 67, p. 265.

²³ *Gesetz, betreffend die Vertretung des Reichskanzlers*, 17 March 1878, RGBl. (1878), no. 4, pp. 7f. On the negotiations concerning the Proxy Law, see Binder, *Reich*, chapter 2, pp. 71-112.

continued and the substitution of the Chancellor needed to be redefined. The first draft of the bill provided that the Chancellor should choose his substitutes from the Prussian *Bundesrat* plenipotentiaries. This plan aroused fierce opposition among the governments of the middling states, as they feared that Prussia's hegemony would grow into total domination.²⁴ In light of this resistance, Bismarck soon dropped the idea of creating – in the words of the administrative historian Rudolf Morsey – a 'federal administration painted in black and white', the colours of the Prussian flag.²⁵ Instead, the final version of the law determined that the Chancellor had to choose his substitutes from the state secretaries that headed the *Reichsämtner*.

In terms of legislative output, the system of monarchical cooperation under the guidance of the *Kanzleramt* was very effective. This was not least due to favourable circumstances. Delbrück could rely on a national-liberal majority in the *Reichstag*, which shared with him the belief in free trade and minimal legal regulation. On this basis, federal legislation made great progress in the economic and legal integration of the union, in particular between 1867 and the mid-1870s (see Table 2). Milestones included the Trade Regulation Act of 1869 and the German Penal Code of 1870. With the exception of the 1877 laws on the judiciary, which limited the judicial sovereignty of the states, none of the laws that were adopted until 1879 changed the fundamental distribution of competences between the Reich and the states.²⁶ Nevertheless, by including new economic and judicial matters into the list of federal responsibilities national legislation did shift the centre of decision-making closer to the national level.

²⁴ See the report by the President of the *Kanzleramt* Karl von Hofmann to Bismarck, 11 February 1878, printed in Goldschmidt, *Kampf*, no. 53, pp. 237f.

²⁵ ['Reichsverwaltung mit schwarz-weißem Anstrich'] Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, p. 307.

²⁶ On the 1877 judiciary laws, see the introduction, overview, and source collection by Werner Schubert, *Die deutsche Gerichtsverfassung (1869-1877): Entstehung und Quellen*, Ius commune 16 (Frankfurt am Main: Klostermann, 1981). For a brief overview, see Rosenau, *Hegemonie und Dualismus*, pp. 92ff.

Despite the legislative productivity of these years, the regime of administrative centralism proved problematic over time. There were several reasons for this. Bismarck and Delbrück, the two leading figures of the system, increasingly got into conflict with each other. As the driving force of Germany's domestic integration, the president of the *Kanzleramt* had gained such a pivotal position that Bismarck, whose energies were bound in the arena of foreign politics in the first years after unification, started to see him as a threat to his own authority. The silent disagreement between the two broke out into open conflict in the context of the reorientation of Germany's economic policies in the mid-1870s. For Delbrück, a free trade activist, Bismarck's turn to protectionist policies was simply unacceptable. In 1876, he handed in his resignation.²⁷

Another major reason for the demise of the system of administrative centralism was that it eroded the anti-parliamentary function of federal structures. The fact that many federal bills were now prepared by the *Kanzleramt* rather than by the Prussian ministries nurtured demands for the introduction of parliamentarily responsible federal ministries. So did the great number of federal laws that were adopted. In April 1869, the liberals put forward a motion in the *Reichstag* that called for the creation of responsible ministries.²⁸ In the ensuing parliamentary debate, Bismarck had to admit for the very first time that the *Bundesrat* committees could no longer fulfil all ministerial functions.²⁹

It was also problematic that the system of administrative centralism lacked coordination between the Prussian and federal executive. Whenever the Prussian cabinet pursued other interests than the *Kanzleramt*, federal government was locked in paralysis. This became most obvious in the failure of the 1869 fiscal reform. Under the leadership of the Prussian State

²⁷ Oswald Schneider, *Bismarcks Finanz- und Wirtschaftspolitik. Eine Darstellung seiner volkswirtschaftlichen Anschauungen*, Staats- und sozialwissenschaftliche Forschungen 166 (Munich and Leipzig: Dunker & Humboldt, 1912), p. 49. See also Cholet, *Der Etat des Deutschen Reiches in der Bismarckzeit*, p. 199 and Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, pp. 73f.

²⁸ Motion by Karl von Twesten and Georg Herbert zu Münster in the North German *Reichstag*, *Stenographische Berichte (NDB)*, 1869, session 20, 16 April, pp. 389ff.

²⁹ See *ibid.*, pp. 401-5, especially p. 403. On this issue, see Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, p. 57.

Ministry, the governments of the middling and small states prevented the introduction of a small set of direct federal taxes that the *Kanzleramt* had proposed in order to cover the increasing costs of domestic integration. In contrast to Bismarck, the state governments perceived this reform as too great a risk for monarchical power, because it would have given the *Reichstag* control over direct taxation for the first time.³⁰ As the State Ministry continued to obstruct the progress of federal politics in important matters such as this, Bismarck concluded in 1877 that Prussian particularism was the ‘worst enemy of the Reich’ and that therefore ‘the experiment of establishing a federal administration independent [of Prussia] had failed’.³¹

Bismarck’s main problem was that he could not find a way to loosen the grip of the State Ministry on national policy-making. He skipped back and forth between different initiatives: some aimed to establish a system of personal unions between the Prussian and national administration, others to separate the two completely. In January 1873, the Chancellor handed his office as Prussian prime minister over to Albrecht von Roon, the minister of war.³² While this move was also intended to reduce Bismarck’s workload, the main motive behind it was to decrease the influence of the State Ministry by severing its relationship with the Chancellor. Bismarck remained a member of the cabinet by retaining his office as Prussian foreign minister, the position that gave him the right to instruct the Prussian *Bundesrat* plenipotentiaries. But it quickly became clear that his plan was unworkable. Without being prime minister, Bismarck lacked the authority in the State Ministry to generate support for the

³⁰ On the failure of the 1869 fiscal reform, see Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, pp. 54-61

³¹ [‘schlimmster Gegner des Reichs’] Bismarck in a conversation with the state secretary of the Federal Department of Justice Heinrich von Friedberg, December 1877, quoted in Goldschmidt, *Kampf*, p. 33. [‘Versuch einer selbständigen Reichsverwaltung für gescheitert’] Bismarck in a letter to the state secretary of the Federal Foreign Office Bernhard von Bülow, 15 December 1877, printed in *ibid.*, no. 38, p. 193.

³² *Protokolle (PSM)*, vol. 6/II (January 1867-December 1878), p. 760.

federal projects and policies that he pursued as Chancellor. After no more than eleven months, the experiment was over and Bismarck became prime minister again.³³

There were two major attempts to overcome the dualism between the Prussian and federal executive: the first in 1869 and the second at the turn of 1877/78, when the growth of the national deficit made a tax reform inevitable. On both occasions, Bismarck tried to harmonise the Prussian and federal fiscal administration by establishing a system of personal unions. His idea was to make the Prussian minister of finance responsible for the fiscal affairs of the whole union, a system similar to the organisation of military matters.³⁴ But Bismarck's plan failed. Neither in the Prussian nor in the federal administration was there any support among high-ranking officials for the introduction of a personal union. Most bureaucrats had started their careers in one of the Prussian ministries long before unification. Still Prussians at heart and aware of the process of centralisation that was underway, many of them feared that a system of personal unions might come at the expense of Prussia, ultimately leading to her mediatisation. This, indeed, was the reason that Delbrück gave when he declined the offer to assume the office of Prussian minister of finance in addition to his position as president of the *Kanzleramt*.³⁵

The state governments also rejected a system of personal unions, but for the opposite reason. Their great fear was that fiscal affairs would be taken over by exclusively Prussian-minded staff, and thus further enlarge Prussia's hegemony over the union. Both the Bavarian and Saxon governments complained vehemently that personal unions would in fact exempt Prussia from the national supervision of how the states implemented federal laws.³⁶ In particular with regard to railway affairs, the state governments also feared that the federalisation of the Prussian administration might just be the first step towards making this

³³ Rosenau, *Hegemonie und Dualismus*, pp. 27-9.

³⁴ On Bismarck's plan, see the analysis by Goldschmidt, *Kampf*, pp. 41-68.

³⁵ Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, p. 58.

³⁶ See for example the letter by the Saxon envoy Oswald von Nostitz-Wallwitz to his brother, the Saxon foreign minister Hermann von Nostitz-Wallwitz, 30 December 1877, printed in Goldschmidt, *Kampf*, no. 44, pp. 215f.

area a national competence, with the result that they would lose all their rights.³⁷ The national liberals fanned the flames by claiming, as the historian and MP Heinrich von Treitschke put it, that a national system of railway administration would be ‘the sure road to a unitary state’.³⁸

Due to this resistance, no personal union was introduced but in the field of commerce, where most matters automatically had a national character. Bismarck himself took over the Prussian ministry of commerce in 1880.³⁹ That he failed to introduce a system of personal unions in any other field meant that the dualism between the Prussian and federal executive stayed intact. After 1877/78, there was no further attempt to overcome it by means of a structural reform. Judicial, fiscal, and railway affairs thus remained permanently divided between the national and Prussian administration, with the former preparing and the latter – like the ministries of the other states – implementing federal laws.

The institutions that were responsible for the preparation of bills were the *Reichsämtler*. Their emergence was the main reason why the regime of administrative centralism under the *Kanzleramt* came to an end. In the course of the domestic integration of the union, the federal remit became so big that a single institution could no longer handle the workload. Moreover, the *Reichstag* demanded that the *Kanzleramt* structure its exploding expenses according to its different directorates. Otherwise, the parliament warned, it would no longer approve the budget.⁴⁰ All this made it necessary to transform the *Kanzleramt* into a number of separate administrative agencies. The proper model of organisation was the *Auswärtige Amt*, the Federal Department of Foreign Affairs, which had been established in 1870 by turning the

³⁷ See Bismarck’s letters to the Prussian minister of commerce Heinrich von Achenbach, 15 December 1877, and to the state secretary of foreign affairs Bernhard von Bülow, 15 December 1877, printed in *ibid.*, no. 37 and 38, pp. 190-6. See also the analysis by Goldschmidt in *ibid.*, pp. 31f., 53f. and the study by the contemporary professor for railway law Alfred von der Leyen, *Die Eisenbahnpolitik des Fürsten Bismarck*.

³⁸ [‘der sichere Weg zum Einheitsstaate’] Heinrich von Treitschke in a letter to Gustav Freytag, 19 December 1875, printed in Fenske, *Bismarcksches Reich*, no. 46, p. 157.

³⁹ See Bismarck’s letter to William I, 12 October 1880, printed in Goldschmidt, *Kampf*, no. 80, p. 283. *Protokolle (PSM)*, vol. 7 (January 1879-March 1890), p. 508.

⁴⁰ Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, pp. 46ff., 291ff.

Prussian foreign ministry into an independent federal agency under the direction of a state secretary.⁴¹

Starting in 1873, the *Kanzleramt* was gradually split up into a wide range of independent *Reichsämt* (see Table 3). The departments of railway affairs, postal services, Alsace Lorraine, and justice had all emerged by 1877. With reference to this great increase in national competences and administrative agencies, Bismarck spoke of a ‘Reich flood’ during the parliamentary negotiations of the federal budget in the same year.⁴² When responsibility for fiscal matters was transferred to the newly found Federal Treasury, the *Reichsschatzamt*, in 1879, the *Kanzleramt* was renamed *Reichsamt des Innern*, Federal Department of the Interior.⁴³ Its field of competence had shrunk considerably, as it now managed only those matters of national administration that were not explicitly conferred upon any other federal department. Within the first eight years after unification, a functionally differentiated system of federal administration had been established. The era of administrative centralism was over.

Despite their responsibility for preparing bills and monitoring the implementation of federal laws in the states, the *Reichsämt* were not proper federal ministries. The state secretaries that headed them did not form a collegial cabinet. Rather, they stood under the direct control of the Chancellor, who remained the only federal minister. There was not even a regular meeting where the state secretaries came together in order to coordinate the policies of their respective departments.

Nevertheless, the creation of the *Reichsämt* offered the *Reichstag* the chance to renew its call for the introduction of responsible federal ministers in a more concrete way than ever before. It could now demand quite simply that the state secretaries be declared parliamentarily accountable. In their campaign for the *Reichstag* election of 1877, the national liberals

⁴¹ For a detailed analysis of how the different *Reichsämt* emerged, see Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, chapter 2, pp. 63-241.

⁴² [‘Reichsflut’] Bismarck in the *Reichstag*, *Stenographische Berichte (DR)*, 1877, session 6, 10 March, pp. 69-74, quote on p. 73.

⁴³ *Allerhöchster Erlaß, betreffend die Benennung des Reichskanzler-Amtes und den Titel des Vorstandes dieser Behörde*, 24 December 1879, *RGBl.* (1879), no. 37, p. 321.

claimed that ‘with the growing scope and the increasing expansion of national authority the need for the introduction of responsible holders of the different branches of legislation and administration is becoming more and more urgent’.⁴⁴ This demand gained even more momentum after the 1879 Proxy Law had been adopted. As the state secretaries took on the functional substitution of the Chancellor, their positions came to resemble even more closely those of federal ministers.⁴⁵

With structural change appearing to favour its cause, the *Reichstag* became more self-confident and began to wield more influence. When confronting the federal executive, the parliamentary parties now occasionally advocated the interests of the different states, because they saw this as an opportunity to diminish the importance of the *Bundesrat*. The Catholic Centre Party made the defence of the independence of the states one of its top priorities, most importantly because it wanted to protect the Catholics in the southern states against the repressive measures of the Culture Wars and, more generally, against the dominant Prussian-Protestant interest in the union.⁴⁶

That this strategy could have momentous consequences for federal government became clear in the tariff reforms of 1878/79. The Centre Party made great efforts to maintain the financial dependence of the Reich on the *Länder* by adopting the Franckenstein Clause, which was named after one of the parties’ leading members. This provision obliged the Reich to distribute all tariff revenues in excess of 130 million Goldmark among the states.⁴⁷ Together with the subsidies that the *Länder* had to pay to the Reich in case of a federal deficit, the

⁴⁴ [‘Mit dem wachsenden Umfang und der steigenden Ausdehnung der Reichsgewalt wird das Bedürfnis nach Einsetzung verantwortlicher Träger der einzelnen Zweige der Gesetzgebung und Verwaltung des Reiches immer dringender.’] Manifesto of the National Liberal Party, 28 December 1876, printed in Fenske, *Bismarcksches Reich*, no. 52, p. 170.

⁴⁵ Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, chapter 4, pp. 287-312, especially p. 309.

⁴⁶ On the Centre Party as the ‘party of federalism’ [‘Partei des Föderalismus’], see Albert Funk, *Kleine Geschichte des Föderalismus: vom Fürstenbund zur Bundesrepublik* (Paderborn: Schöningh, 2010), pp. 235. On the guiding political principles of the Centre Party more generally, including the advocacy of federalism and regionalism, see Winfried Becker, ed., *Die Minderheit als Mitte. Die Deutsche Zentrumspartei in der Innenpolitik des Reiches 1871-1913* (Paderborn: Schöningh, 1986).

⁴⁷ *Gesetz, betreffend den Zolltarif des Deutschen Zollgebiets und den Ertrag der Zölle und der Tabaksteuer*, 15 July 1879, RGBl. (1879), no. 27, § 8, p. 244.

Franckenstein Clause – whose unconstitutional character will be analysed in Chapter 5 – established a complex system of financial redistribution that denied the Reich an independent financial basis for many years. This dependency limited considerably the scope of action of the federal executive.⁴⁸

What particularly worried Bismarck about the negotiations leading to the tariff reforms was the fact that the *Bundesrat* no longer monopolised the representation of the interests of the states. This marginalisation of the council of monarchical governments implied that its function as a bulwark against the advance of parliamentary power was crumbling. At the turn of the decade, Bismarck thus took action to redefine the system of federal government that had emerged since the unification.

II. Confederate Restoration: The Failed Revitalisation of the *Bundesrat* (1879-1890)

Bismarck realised that in order to prevent a further expansion of parliamentary influence he had to bring the process of centralisation that had set in since unification to a standstill. For this purpose, he wanted to restore the confederate structures that the constitution had originally established. At the centre of this strategy was the idea to reinvigorate the *Bundesrat* as the central organ of government, so it could shield the Chancellor and the heads of the newly established *Reichsämler* from the demands of the *Reichstag*. Rather than relying on the cooperation of the diplomatic missions outside the constitutional framework, Bismarck considered, the monarchical governments had to oppose

⁴⁸ On the Franckenstein Clause, see Cholet, *Der Etat des Deutschen Reiches in der Bismarckzeit*, p. 480; Holste, *Bundesstaat*, pp. 196f; Huber, *Verfassungsgeschichte*, vol. 3, pp. 950-2; and Rosenau, *Hegemonie und Dualismus*, pp. 100-102. For a brief overview of the relevant fiscal questions, see Winfrid Halder, *Innenpolitik im Kaiserreich 1871-1914*, 3. ed. (Darmstadt: WBG, 2011), pp. 13f.

the parliament collectively in the *Bundesrat*: 'If I have the choice between strengthening 25 constituent state governments or the power of the *Reichstag*, I choose the former!'⁴⁹

The implementation of this plan seemed all the more necessary to him because the federal parliament had not only become more powerful, but was also becoming increasingly difficult to handle. Under pressure from the land-owning Prussian Junkers, who feared that the global economic downturn would depress grain prices even further, Bismarck had begun to adopt protectionist economic policies in 1878. This decision ended his alliance with the national liberals and forced him to collaborate with a much more volatile coalition of the Centre Party and the Conservatives. While he managed to conclude peace with the Centre Party by gradually rescinding the repressive measures of the Culture Wars, his predicament worsened after the 1881 election, in which the left liberals won a quarter of all seats. The age of comfortable majorities had evidently come to an end.

As this change of circumstances forced the Chancellor to adopt a more accommodating view of the demands of the *Reichstag*, the creation of a collegial cabinet suddenly appeared a real possibility. The monarchical governments recognised this danger. When in April 1879 Bismarck convened a meeting of the state secretaries for the very first time, they warned him that if he made this conference a permanent institution, it might easily be transformed into a responsible cabinet as soon as he – the guarantor of the status quo – left office.⁵⁰ The prospect of Crown Prince Frederick's imminent ascent to the throne made this threat even more serious, because he and his English wife Victoria showed open sympathies for the left liberals and their agenda of introducing parliamentary government.⁵¹

⁴⁹ ['Wenn ich die Wahl habe, entweder 25 Partikularregierungen zu stärken oder die Macht des Reichstages, dann wähle ich das erstere!'] Bismarck in a conversation with the Prussian minister of finance Arthur Hobrecht, 29 June 1879, quoted in Goldschmidt, *Kampf*, p. 69.

⁵⁰ See the letter by the Saxon envoy Oswald von Nostitz-Wallwitz to his brother, the Saxon foreign minister Hermann von Nostitz-Wallwitz, 14 April 1879, printed in Goldschmidt, *Kampf*, no. 65, pp. 258-60.

⁵¹ Binder, *Reich*, p. 147. On Frederick's liberal inclinations, see the biographical studies by Patricia Kollander, *Frederick III. Germany's Liberal Emperor*, Contributions to the Study of World History 50 (London: Greenwood Press, 1995) and Frank Lorenz Müller, *Our Fritz: Emperor Frederick III and the Political Culture of Imperial Germany* (Cambridge, Mass. and London: Harvard University Press, 2011).

But the monarchical governments needed not worry. Bismarck did not intend to introduce regular meetings with the state secretaries. The creation of such a round-table of the highest-ranking national executives would have contradicted the very reason why he held the conference in the first place. He had summoned the state secretaries in order to inform them that by restoring the original structures of the constitution he would eliminate all governmental practices that offered the *Reichstag* a point of attack.⁵²

This plan comprised two basic parts. First, Bismarck wanted to make the plenary assembly of the *Bundesrat* an active forum of decision-making again, a function that it had largely lost since unification. Second, he wanted to reduce the position of the Chancellor – the only federal minister – to what it had been before the adoption of the Lex Bennigsen: the chairman of the *Bundesrat*. In order to put these ideas into practice, Bismarck issued a series of measures over the course of the 1880s that intended to increase his control over the *Bundesrat*; to strengthen the *Bundesrat* as the legislative counterpart of the *Reichstag*; and to hide the state secretaries and the Chancellor behind the anonymous majority decisions of the *Bundesrat*.⁵³

These goals made it necessary first to limit the independence that the federal administration had gained over the previous decade. The executives of the *Reichsämtler* became active in the machinery of federal government – as we will see in the next chapter – via their position as Prussian *Bundesrat* plenipotentiaries. Bismarck therefore attempted to increase the control that he enjoyed as Prussian foreign minister over the Prussian *Bundesrat* bench. From 1880 onwards, plenipotentiaries could no longer propose motions without first showing them to the foreign minister.⁵⁴ Moreover, the explicit instruction of the foreign

⁵² See the protocol of the conference of the state secretaries, 9 April 1879, printed in Goldschmidt, *Kampf*, no. 64, pp. 250-8.

⁵³ On these measures, see Binder, *Reich*, pp. 142-56; the analysis by Goldschmidt, *Kampf*, 69-93; and Rauh, *Föderalismus*, pp. 77-84.

⁵⁴ See the protocol of the conference of state secretaries, 9 April 1879, printed in Goldschmidt, *Kampf*, no. 64, pp. 253f. Bismarck later reinforced this measure in a directive to the state secretaries of the *Reichsämtler*, 25 May 1885, printed in *ibid.*, no. 92, pp. 311f.

minister became a prerequisite for casting the Prussian vote in the *Bundesrat*, regardless of whether this instruction reflected a personal choice by the minister or a majority decision of the State Ministry.⁵⁵

In order to reactivate the *Bundesrat* as a forum of decision-making, all Prussian ministers were appointed plenipotentiaries.⁵⁶ Bismarck hoped that the other state governments would follow this example.⁵⁷ In addition, he wanted to abolish the practice of presidential proposals in favour of a system based on Prussian proposals. He explained the complex rationale behind this idea in a letter to one of the state secretaries in 1883. Presidential proposals, Bismarck argued, strengthened the role of the Chancellor in the executive at the expense of the *Bundesrat*, because they made the latter appear as a ministry in a government that was headed by the former. As a consequence, presidential proposals made the Chancellor more vulnerable to the demand that he should be turned into a parliamentarily responsible prime minister. In contrast, Prussian proposals treated the *Bundesrat* merely as the legislative counterpart of the *Reichstag*. Hence, Bismarck concluded, they protected the executives of the *Reichsämtler* who were Prussian plenipotentiaries by making them part of the anonymous majority in the *Bundesrat*.⁵⁸

Bismarck wanted to reinforce this protective effect by transforming the *Bundesrat* into a purely legislative body. For this purpose, he played with the idea of shifting the few executive functions that the *Bundesrat* committees still had – most importantly the preparation of guidelines for the framing of proposals – to consultative bodies outside the official constitutional framework, in which national executives would be safe from ‘the danger [...] of

⁵⁵ See Bismarck’s letter to the state secretary of the Federal Department of the Interior Karl Hofmann, 8 March 1880, printed in *ibid.*, no. 73, pp. 271-3.

⁵⁶ Compare *Handbuch*, 1880, pp. 4-6 with *Protokolle (PSM)*, vol. 7 (January 1879-March 1890), pp. 508-10.

⁵⁷ See the protocol of the Prussian State Ministry, 16 March 1884, printed in *ibid.*, no. 89, pp. 303-6, especially p. 305.

⁵⁸ See Bismarck’s letter to the state secretary of the Federal Department of Justice Hermann von Schelling, 21 December 1883, printed in *ibid.*, no. 86, pp. 295-7. See also his letter to the state secretary of the Federal Foreign Office Herbert von Bismarck, his son, 15 December 1889, printed in *ibid.*, no. 97, pp. 317-19.

becoming subject to a direct government of changing parliamentary majorities'.⁵⁹ At different times, his plans included the foundation of a *Reichsrat* and the revival of the Prussian *Staatsrat*. It is hard to see the difference between them, as Bismarck wanted both of them to comprise the state secretaries of the *Reichsämtler*, the Prussian ministers, and other executives chosen by the Kaiser or the Prussian king.⁶⁰ But his favourite project was the creation of a national economic council, the *Volkswirtschaftsrat*. He imagined this body as an ancillary parliament that would marginalise the *Reichstag*, be totally submissive to the Chancellor, and undermine the growing success of the Social Democrats by comprising representatives of the working class.⁶¹

As early as 1880, Bismarck pushed a reform of the by-laws through the *Bundesrat*.⁶² The new rules were intended to make the plenary assembly more active by increasing the attendance of high-ranking executives from the states, above all the ministers. The state governments were now prohibited from conferring their vote upon the plenipotentiary of another state in consecutive sessions.⁶³ At the same time, the different affairs that the *Bundesrat* had to deal with were categorised according to their importance.⁶⁴ This made it possible for the executives from the states to pick the sessions they would attend. As Bismarck put it: 'Certainly, no minister will be enticed to participate in the decision-making about the product approval of rose petals as a surrogate for tobacco [...].'⁶⁵

⁵⁹ ['Gefahr [...] der direkten Regierung durch wechselnde Parlamentsmajoritäten [zu] verfallen'] Bismarck in a letter to the state secretary of the Federal Department of the Interior Karl Heinrich von Boetticher, 13 January 1884, printed in *ibid.*, no. 87, p. 299.

⁶⁰ On the creation of a *Reichsrat*, see *ibid.* On the revival of the Prussian *Staatsrat*, see the protocol of the Prussian State Ministry, 16 March 1884, printed in *ibid.*, no. 89, pp. 303-6. See also Goldschmidt's interpretation of these sources, *ibid.*, pp. 83-7.

⁶¹ See Bismarck's report to William I, 10 September 1880, printed in *ibid.*, no. 79, pp. 280f. See also Goldschmidt's interpretation of this report, *ibid.*, pp. 76-9.

⁶² On this issue, see Binder, *Reich*, pp. 127-34; the analysis by Goldschmidt, *Kampf*, pp. 71f.; and Rauh, *Föderalismus*, pp. 77-80.

⁶³ *Geschäftsordnung* (1880), § 2.

⁶⁴ *Ibid.*, § 3.

⁶⁵ ['Freilich werde sich kein Minister angelockt fühlen, an einem Beschlusse über Zulassung der Rosenblätter als Tabaksurrogat mitzuwirken [...].'] Reported by the Württemberg envoy Carl von Spitzemberg in a letter to the Württemberg prime minister Hermann von Mittnacht, 15 March 1880, printed in Goldschmidt, *Kampf*, no. 74, p. 274.

But the new by-laws were also meant to put the *Bundesrat* under Bismarck's control. The underlying idea of the revised regulations was to shift the centre of consultation from the committees to the plenary assembly, for example by introducing two readings for each bill.⁶⁶ Here, Prussia held by far the biggest share of votes. As Bismarck instructed the Prussian bench in his capacity as Prussian foreign minister, this shift gave him much more control over what happened in the *Bundesrat*. The losers of this reform were the middling states, as they dominated the committees. In light of Bismarck's control over the plenary assembly, the Mecklenburg plenipotentiary Karl Oldenburg complained that the reform of the by-laws reduced the *Bundesrat* to a 'voting machine' of the Prussian and federal executive 'every bit as bad as the Frankfurt Bundestag'.⁶⁷

Despite this limitation of their scope of action, the protest of the state governments against the reform of the by-laws was relatively muted. In general, they bowed to Bismarck's pressure much more readily in the 1880s than in the decade before. This was partly due to the fact that Bismarck became more rigorous. In particular when dealing with the small states, he lost his patience quickly and often treated them in a way that was hardly compatible with his principle of *Bundesfreundlichkeit*. This was most obvious in a conflict over the definition of the Hamburg customs area, which raised the question whether the *Bundesrat* had a right to interpret the constitution. Bismarck threatened the state governments that Prussia would leave the union if they decided to create a precedent for such a right.⁶⁸ Given this threat, the state governments had little choice in this dispute – which we will examine further in Chapter 5 – but to eventually follow Bismarck's will.

But the main reason why the monarchical governments supported Bismarck's reform of the federal system was that the increasing influence of the *Reichstag* made the introduction of

⁶⁶ See *Geschäftsordnung* (1880), § 16. On this issue, see Binder, *Reich*, p. 133.

⁶⁷ ['Stimmmaschine [...] wie sie im Frankfurter Bundestag nicht schlimmer war'] Quoted in Binder, *Reich*, p. 133.

⁶⁸ See Bismarck's letter to the Prussian envoy in Oldenburg, Prinz zu Ysenburg, 9 May 1880, printed in Goldschmidt, *Kampf*, no. 75, p. 276. See also Goldschmidt's interpretation of this issue, *ibid.*, pp. 73-6. On the conflict over the Hamburg customs area, see Binder, *Reich*, pp. 134-40.

parliamentary government more likely than ever before. They had no option but to stand together under his leadership, unless they wanted to give in to the advance of parliamentary power. The issue came to a head in April 1884, when the new left-liberal German Radical Party, the *Freisinnige Partei*, was founded.⁶⁹ Its manifesto made the creation of a parliamentarily responsible cabinet the main goal of the party.⁷⁰ As a reaction, Bismarck made the monarchical governments issue a joint declaration in the *Bundesrat*. In almost aggressive terms, the note argued that the introduction of responsible ministries was incompatible with the federal nature of Germany, because it would come ‘at the expense of the sum of contractual rights that [...] the united governments exercised in the *Bundesrat*’. Since ‘the united governments are determined without exception to abide in undying allegiance by the contracts on which our federal institutions are based’, the declaration made clear, they would meet any attempt to ‘submit the government of the Reich to the majority decisions of the *Reichstag*’ with the ‘dissolution of the German union’.⁷¹

While Bismarck was successful in creating a phalanx of the monarchical governments, he did not manage to restructure the functions of the federal executive and legislature. Most of his measures failed miserably, because they were either ignored or foundered on practical difficulties. A few examples must suffice. The ever-growing volume of legislative and executive activity made it impossible for the Prussian foreign minister to coordinate the relationship between the *Bundesrat* and the *Reichsämtler* on his own. In 1885, Bismarck suspended the ban of direct contact between the state secretaries and the *Bundesrat* for all

⁶⁹ On the April crisis, see the letter by the Saxon envoy Oswald von Nostitz-Wallwitz to the Saxon foreign and prime minister Alfred von Fabrice, 14 March 1884, the protocol of the Prussian State Ministry, 16 March, 1884, and the letter by William I to Bismarck, 13 April 1884, which are printed in Goldschmidt, *Kampf*, no. 88-90, pp. 300-8. See also Binder, *Reich*, pp. 150-3; Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, pp. 297ff.; and Rauh, *Föderalismus*, p. 81.

⁷⁰ Manifesto of the German Radical Party, 5 March 1884, printed in Fenske, *Bismarcksches Reich*, no. 93, pp. 315f.

⁷¹ [‘auf Kosten der Summe von vertragsmäßigen Rechten, welche die Verbündeten Regierungen [...] im Bundesrat üben’], [‘die Verbündeten ohne Ausnahme entschlossen sind, die Verträge, auf welchen unsere Reichsinstitutionen beruhen, in unverbrüchlicher Treue zu erhalten’], [‘Unterwerfung der Regierungsgewalt im Reich unter die Mehrheitsbeschlüsse des Reichstages’], [‘Wiederauflösung der deutschen Einheit’] *Protokolle (DR)*, 1884, session 16, 5 April, § 180, pp. 96-8. The declaration will be further discussed in Chapter 5.

‘insignificant matters of the ongoing administration’.⁷² This definition was so imprecise that in the following years it happened more and more often that motions were proposed without his knowledge and that the Prussian vote was cast without his instructions.⁷³

None of the consultative bodies that Bismarck had envisaged was made a permanent institution. This failure was mainly due to the fact that these assemblies embraced the same set of office holders, who could not possibly take part in all of them.⁷⁴

But the biggest flop was probably the revision of the *Bundesrat* by-laws. The centre of consultation shifted back from the plenary assembly to the committees within a few months, not least because here the plenipotentiaries could rely on the assistance of expert clerks (see Chapter 4). The attendance of the ministers from the states – an issue that the next chapter will examine in more detail – dropped rather than increased over the 1880s. They simply despised the conditions under which the *Bundesrat* had to work. Most annoying were the political pressure from the Chancellor, the short periods of consultation, and the lack of information from the *Reichsämtler*.⁷⁵

Bismarck’s programme for a confederate restoration therefore achieved partly the opposite of what it had intended: the *Bundesrat* slowly eroded from within rather than experiencing a revival as a forum of decision-making. The middling states in particular continued to make their voices heard via their diplomatic missions rather than in the *Bundesrat*, even though the growing number of national laws implied that the influence of the federal legislative organs on the states was greater than ever before.⁷⁶

A restoration of the constitutional conditions of 1867 had simply become impossible by the 1880s. Already in December 1883, the Wurttemberg Prime Minister Hermann von Mittnacht

⁷² [‘unerheblichen Gegenstände der laufenden Verwaltung’] Bismarck’s directive to the state secretaries of the *Reichsämtler*, 25 May 1885, printed in Goldschmidt, *Kampf*, no. 92, p. 312.

⁷³ See for example Bismarck’s letter to Homeyer, an undersecretary of state in the Prussian State Ministry, 25 March 1889, printed in *ibid.*, no. 95, pp. 315f, where he complained about not having been informed about a motion concerning the collection of certain statistical data, a measure that he deemed unnecessary.

⁷⁴ See the analysis by Goldschmidt, *Kampf*, pp. 87f.

⁷⁵ Binder, *Reich*, pp. 133f., 154-6. Rauh, *Föderalismus*, pp. 79f.

⁷⁶ Binder, *Reich*, p. 145.

told Bismarck that he ‘deemed a backwards revision impossible because of the *Reichstag*’.⁷⁷ The crux of the matter was that Bismarck could not recapture the spirits that he had released: the increasing independence of the *Reichsämtler*; the competition between the Prussian and national administration; the apathy of the state governments in the *Bundesrat*; and – not least – the steadily growing federal remit at the expense of the states. The legislation of the 1880s concerned primarily the creation of the public insurance sector that Bismarck developed in the context of his campaign against the Social Democrats (see Table 2). While these laws did not encroach upon the competences of the states directly, they shifted the centre of public activity further to the Reich, most importantly because they made national rather than state-based institutions responsible for regulating the insurance sector.

When he realised that he could not bring about a confederate restoration, Bismarck abandoned his plans and tried to preserve at least the status quo. After 1885, his measures against the *Reichstag* became more defensive. Most importantly, he wanted to prevent high-ranking executives of the *Reichsämtler*, who were usually also part of the Prussian *Bundesrat* bench, from working closely together with the *Reichstag*. To this end, he prohibited Prussian *Bundesrat* plenipotentiaries from replying to the *Reichstag* in the name of the monarchical governments and from helping the parliament with framing and amending bills unless they had the explicit permission of the Prussian king.⁷⁸

These measures show that Bismarck was still looking for an effective remedy against the steadily growing influence of the parliament. This was also the reason why in December 1885 he decided to convene – for the second time ever – a conference of the state secretaries.⁷⁹ But in the end he came to the same conclusion that he had already reached five years before, namely that he could not make the conference a permanent institution without risking that it

⁷⁷ [‘eine Rückwärtsrevidierung mit dem Deutschen Reichstag halte ich für ausgeschlossen’] Quoted in *ibid.*, p. 147.

⁷⁸ See Bismarck’s directive to the Prussian *Bundesrat* plenipotentiaries, 27 January 1885, and his letter to the state secretary of the Federal Department of the Interior Karl Heinrich von Boetticher, 4 December 1888, printed in Goldschmidt, *Kampf*, no. 91, 94, pp. 308–11, 314f.

⁷⁹ See the analysis by Goldschmidt, *ibid.*, pp. 66, 89f. See also Rauh, *Föderalismus*, p. 71.

would evolve into a federal cabinet. Fifteen years after the unification, there was therefore still no forum in which the highest-ranking federal executives could coordinate their policies.

Moreover, Bismarck's defensive measures were a denial of political reality. By the mid-1880s, the negotiation of most bills took place long before they were introduced into the official legislative process. Compromises were often reached in informal negotiations that included envoys of the state governments, executives from the *Reichsämtler*, and more and more often even members of the majority parties in the *Reichstag*.⁸⁰

After William I and Frederick III had died within a few months and William II had ascended to the throne in 1888, most of Bismarck's measures gradually became obsolete. As he no longer enjoyed the unconditional trust of the Emperor, his authority was no longer sufficient to control the complex system of federal government that had evolved. His main worry remained the advance of the *Reichstag*. But he did not have new ideas of how to keep the parliament at bay. Like a mantra, he repeated his view that the federal executive had to hide behind the majority decisions of the *Bundesrat*, even though the last years had demonstrated that this system was impractical.⁸¹

In 1890, as his relationship with the new Kaiser deteriorated and the *Kartell* parties lost their majority, he came up with the plan of a confederate coup d'état. With reference to the unification treaties, he proposed that the princes could terminate the union and reconstitute the Empire on the basis of a constitution that would give the parliament less power. In light of his crumbling authority, however, this scheme – which we will consider more closely in Chapter 5 – was no more than a desperate figment of his imagination.⁸²

⁸⁰ Christian Henrich-Franke, "Wandlungen föderalen Regierens im Deutschen Kaiserreich. Die Entscheidungsfindung im Fall der Sozialgesetzgebung," *HZ* 293, no. 2 (2011), pp. 378-80.

⁸¹ See Bismarck's letter to the state secretary of the Federal Foreign Office Herbert von Bismarck, his son, 15 December 1889, printed in *ibid.*, no. 97, pp. 318f. See also the analysis by Goldschmidt, *Kampf*, pp. 91f.

⁸² Protocol of the Prussian State Ministry, 2 March 1890, printed in Zechlin, *Staatsstreichpläne Bismarcks und Wilhelms II. 1890-1894*, pp. 180ff. On Bismarck's plans for a coup d'état, see Michael Stürmer, "Staatsstreichgedanken im Bismarckreich," *HZ* 209, no. 3 (1969): 566-615. In a federal context, see also Binder, *Reich*, pp. 156-63 and the comments by Goldschmidt, *Kampf*, pp. 75, 92.

There was no way back to the confederate structures that he had established in 1867. In the two decades that had elapsed since the adoption of the constitution, the federal system had developed a strong drive towards centralisation that concentrated power in the Chancellor and the increasingly independent federal departments, expanded the influence of the *Reichstag*, and thus went hand in hand with the demise of the power of the monarchical governments. Even Bismarck could not stop this development, so big was the momentum that it had gained. When he left office, the way for the emergence of parliamentary government had long been paved.

The Dawn of Parliamentary Government (1890-1918)

After Bismarck's dismissal, the centralisation of the union gathered speed, with the result that the federal structures designed to protect the power of the monarchical governments disintegrated and parliamentary government gradually emerged. In the 1890s, the old system of Prussian hegemony was largely dismantled. The Chancellor lost his function of coordinating the Prussian and national executive, while the Prussian State Ministry began to focus on particularistic interests. These changes in federal policy-making made the Chancellor and the state secretaries of the *Reichsämtler* more independent from Prussia and thus increased the concentration of power in the central posts of the national rather than Prussian executive. This development was facilitated by the enhanced capacity of the office of the Emperor, who had gained several important legislative and executive rights since the unification that were not directly related to his position as Prussian king.

The new independence of the national from the Prussian executive had the effect that the Chancellor and the state secretaries evolved into an unofficial federal government, the *Reichsleitung*, which presided over a fully-fledged ministerial bureaucracy, the *Reichsämtler*. This development made the national executive much more susceptible to the attacks of the

Reichstag. During the chancellorships of Bernhard von Bülow (1900-1909) and Theobald von Bethmann Hollweg (1909-1917), the parliament gradually increased its control up to the point where the *Reichsleitung* became dependent on it. As a result, the *Reichstag* replaced the *Bundesrat* as the central organ of the national decision-making process, while the state governments were pushed to the margins. The government of Germany was no longer determined by the collaboration of the monarchical governments, but by the cooperation and competition of the *Reichsleitung* with the *Reichstag*.

After the outbreak of the First World War, the *Bundesrat* was formally revived by equipping it with the power to issue emergency decrees in more or less all fields of government. In practice, however, this power was exercised by the executives of the *Reichsleitung* rather than by the state governments. The *Bundesrat* was no more than a sanctioning machine in a volatile system of wartime government, which was shaped by the dynamic relationships between the *Reichsleitung*, the *Reichstag*, and the Supreme Army Command, the *Oberste Heeresleitung*. The monarchical governments played hardly any role.

From 1917 onwards, the *Reichstag* penetrated the national executive more and more. When the first parliamentarians were appointed state secretaries in 1918, the old federal order – which had been established in order to prevent parliamentary forces from assuming governmental power – had practically dissolved. Germany had changed into a unitary system in which the *Reichstag* controlled the Chancellor and the state secretaries as if they had been legally responsible to the parliament. When the constitution was eventually amended to this effect in October 1918, this revision was merely a matter of form for which the centralisation of the union had set the stage since the late 1860s.

I. The Formation of a Federal Government: Cooperation and Competition between the *Reichsleitung* and the *Reichstag* (1890-1914)

‘I fear that as soon as Prince Bismarck will disappear from the scene, devastating storms will be raised – also within Germany. What arm will be strong enough to take the helm, what eye sharp enough to find the right path to the right destination?’⁸³ When August Reichensperger, one of the leading members of the Centre Party, made this observation in February 1890, he was probably thinking – among other things – about the complex machinery of federal government. On the basis of his personal authority, Bismarck had managed to reconcile the competing interests of the Prussian and federal administration most of the time. After his resignation in March 1890, the Prussian-federal dualism broke out with new force. From 1892 until his dismissal two years later, Chancellor Leo von Caprivi left the Prussian prime ministership to Botho von Eulenburg, after having failed to reform the Prussian school system. Since Karl Heinrich von Boetticher’s resignation in 1897, the state secretary of the Federal Department of the Interior was no longer automatically appointed vice-president of the Prussian State Ministry.⁸⁴ This meant that now the Chancellor and Prussian prime minister had two general proxies, one for his federal and the other for his Prussian office.⁸⁵

The abolition of these personal unions implied that the federal executive lost influence over Prussia. This became most manifest in the permanent quarrel over the right to tell the Prussian *Bundesrat* plenipotentiaries how to vote. While Caprivi insisted that this right rested with him as Prussian foreign minister, Eulenburg argued that the majority decisions of the State Ministry were binding.⁸⁶

⁸³ [‘Ich fürchte, daß, sobald der Fürst Bismarck von der Bildfläche verschwindet, verheerende Stürme entfesselt werden – auch im Innern Deutschlands. Welcher Arm wird dann kräftig genug sein, um das Steuer zu führen, welches Auge scharfblickend genug, um den rechten Weg zum rechten Ziele hin zu erschauen?'] August Reichensperger in a letter to Mrs von Hilgers, 11 February 1890, printed in Fenske, *Bismarcksches Reich*, no. 139, p. 455.

⁸⁴ See *Protokolle (PSM)*, vol. 8.II (March 1890–October 1900), p. 718. Boetticher’s successor as vice-president of the State Ministry was Johannes von Miquel, the Prussian minister of finance, while Arthur Graf von Posadowsky-Wehner became the new state secretary of the interior.

⁸⁵ On the gradual loss of coordination, see the exchange of letters between Chancellor Theobald von Bethmann Hollweg, the Prussian minister of the interior Friedrich von Moltke, and the Prussian minister of finance August Lentze, September 1909–November 1911, printed in Goldschmidt, *Kampf*, no. 104–7, pp. 334–8.

⁸⁶ See for example Caprivi’s letter to Eulenburg, 23 June 1894, printed in *ibid.*, no. 101, pp. 324–7.

To a great extent, the growing divergence of Prussian and federal interests was the result of the different electoral laws in Prussia and the union. The three-class franchise of the Prussian House of Representatives produced much more conservative majorities than the universal suffrage of the *Reichstag*, in which the share of the left liberals and Social Democrats grew constantly. The Chancellor thus had to deal with parliamentary demands that were completely different from those that the Prussian State Ministry had to consider. Without Bismarck's imposing authority, the federal and Prussian executive moved in different directions over time.⁸⁷

Due to Prussia's hegemonic position in the constitution, the growing focus of the State Ministry on exclusively Prussian interests hampered federal government greatly. The historian Hans Goldschmidt has therefore characterised the 1890s as a period of 'particularistic degeneration', in which the federal administration lost its Prussian power base and fell into permanent conflict with the State Ministry.⁸⁸ This became obvious in 1893, for example, when the Prussian finance minister, Johannes von Miquel, sabotaged the tax plans of the Federal Treasury in order to push through his own project of introducing a wine tax. In reaction to this defeat, the state secretary of the Federal Treasury, Helmut von Maltzahn, resigned.⁸⁹

Such conflicts between the federal and Prussian administration drove a wedge between the monarchical governments. The ministers of the middling and small states tended to side with the national authorities, because they usually took their interests into greater consideration than the Prussian departments. This situation could give rise to serious frictions that made the common opposition of the monarchical governments against the parliament crumble, as the negotiation process of the wine tax after Maltzahn's resignation illustrates. The bill that was

⁸⁷ On the problem of the diverging electoral laws, see the letter by the state secretary of the interior Clemens von Delbrück to Chancellor Theobald von Bethmann Hollweg, 18 November 1912, printed in *ibid.*, no. 108, 338-44, especially p. 341.

⁸⁸ ['partikularistische Entartung'] *Ibid.*, p. 112.

⁸⁹ On this controversy, see Rauh, *Föderalismus*, pp. 139-43.

framed on Miquel's initiative largely ignored the interests of the wine-producing southwest German states. In light of the Prussian dominance in the *Bundesrat*, the prime minister of Württemberg, Hermann von Mittnacht, saw no other possibility to prevent the adoption of the bill but to complain about it in the *Reichstag*, speculating that the parliamentarians might reject it on behalf of the southern states.⁹⁰ By adopting this approach, he brought a fight between the state governments, which they were supposed to resolve in the *Bundesrat*, up for discussion in the parliament. While this manoeuvre was successful in preventing the adoption of the tax, it was a clear sign that the *Bundesrat* no longer fulfilled its functions of pooling the forces of the monarchical governments and of advocating their collective interests vis-à-vis the *Reichstag*.⁹¹

In addition to the disintegration of the anti-parliamentary phalanx of the state governments, the shift of the Prussian cabinet's focus from national to Prussian interests had another important consequence: it made the Chancellor and the state secretaries more independent. In 1892, an internal report that the Federal Department of Justice had prepared for the *Kanzleramt* acknowledged for the first time that an independent federal government had evolved:

The Emperor and the Chancellor now form the holders of an independent governmental and executive authority of the Reich, which is different and separate from the Prussian state authority, and they pursue independent federal policies, which do not necessarily coincide with Prussian policies.⁹²

This unofficial federal government became commonly known as *Reichsleitung*. It comprised all the leading members of the national ministerial bureaucracy: the Chancellor and the state secretaries of the *Reichsämler*. Within a few years, the *Reichsleitung* managed to gain

⁹⁰ *Stenographische Berichte (DR)*, 1894, session 31, 20 January, pp. 763-5.

⁹¹ On Mittnacht's manoeuvre, see Rauh, *Föderalismus*, pp. 148-50.

⁹² ['Kaiser und Reichskanzler bilden jetzt die Träger einer eigenen Regierungs- und Exekutivgewalt des Reichs, die von der preußischen Staatsgewalt begrifflich verschieden und getrennt ist, und sie vertreten eine eigene Reichspolitik, die mit der preußischen Politik nicht notwendig überall zusammenfällt.'] Report by the Federal Department of Justice about the constitutionality of presidential proposals, 31 March 1892, printed in Goldschmidt, *Kampf*, no. 100, pp. 323.

supremacy over the Prussian State Ministry. This development became obvious in 1899, when the state secretary of the Federal Treasury replaced the representative of the Prussian Treasury as chairman of the *Bundesrat* committee of finance.⁹³

The ascent of the *Reichsleitung* was a natural consequence of the fact that in the 1890s the centre of public activity shifted further to the national level. The political arena was dominated by nationally relevant questions, such as naval construction and colonial expansion. But the increasing independence of the *Reichsleitung* from Prussia was also due to a major change in structural circumstances. Since the unification, the head of the national administration, the Emperor, had become more independent from his position as Prussian king and had evolved into an important factor of federal government. For structural reasons of federal evolution, he had gained not only the power to initiate legislation by presidential proposals, but also – as my article that can be found in the appendix has shown – to veto laws, to decree ordinances across all fields of government, and to appoint most executives of the *Reichsämtler* and other newly-created national agencies.⁹⁴

These powers greatly enhanced the capacity of the office of the Emperor and enabled him to play a more active role in the national decision-making process. In particular under the weak Chancellor Chlodwig zu Hohenlohe-Schillingsfürst (1894-1900) and his successor Bernhard von Bülow (1900-1909), William II took advantage of this opportunity and sporadically intervened in the legislative process.⁹⁵

⁹³ See Goldschmidt's analysis in *ibid.*, pp. 97f.

⁹⁴ Haardt, "The Kaiser in the Federal State (1871-1918)", especially pp. 539-51.

⁹⁵ See John C. G Röhl, *Germany without Bismarck: The Crisis of Government in the Second Reich, 1890-1900* (London: Batsford, 1967) and Katherine Anne Lerman, *The Chancellor as Courtier: Bernhard von Bülow and the Governance of Germany 1900-1909* (Cambridge: Cambridge University Press, 1990). On William II's alleged personal regime more generally, see Röhl's monumental biographical study *Wilhelm II.*, 3 vols. (Munich: Beck, 1993-2008), the concise summary of his lifetime work on Wilhelmine government *Kaiser Wilhelm II* (Cambridge: Cambridge University Press, 2014), his earlier study *Kaiser, Hof und Staat: Wilhelm II. und die deutsche Politik*. 3rd ed. (Munich: Beck, 1988), and the edited volume John C. G Röhl and Nicolaus Sombart, eds., *Kaiser Wilhelm II: New Interpretations: The Corfu Papers* (Cambridge: Cambridge University Press, 1982). Among the studies that reject the idea of a personal regime, see in particular Christopher Clark, *Kaiser Wilhelm* (London: Longman, 2000) and Wolfgang J. Mommsen, *War der Kaiser an Allem Schuld?: Wilhelm II. und die preussisch-deutschen Machteliten* (Berlin: Propyläen, 2002).

Whether or not we believe in the existence of a personal regime, these interventions did contribute to a functional change of federal government. The negotiations of the military code of criminal procedure, which dragged on for most of the 1890s, are a good example.⁹⁶ At the behest of the Emperor, the Prussian war minister prepared a bill that was based on the conservative Prussian code of procedure from 1845, which was generally seen as out of date, mainly because it stressed the absolute authority of the military leadership. Chancellor and Prussian Prime Minister Hohenlohe never authorised the framing of this bill. He favoured the idea of adopting a revised version of the much more liberal Bavarian code of procedure, which had been framed during his time as Bavarian prime minister in the 1860s, for the whole of Germany – so did the other state governments. Nevertheless, they decided to adopt the Prussian proposal in the *Bundesrat* for tactical reasons. They knew that the progressive majority in the *Reichstag* would reject the bill. Waving it through the *Bundesrat* was thus an easy way to avoid a conflict with the Emperor and to make sure that he would not blame the Chancellor for failing to organise a majority among the states. But this consideration for Hohenlohe's position came at a high price. Instead of taking the dispute about the military code of procedure in their own hands by rejecting the Prussian proposal in the *Bundesrat*, the state governments left the decision to the *Reichstag*. This way, the parliament rather than the council of states acted as the ultimate decision maker of federal government.⁹⁷

Due to incidents such as this, the *Reichstag* gradually replaced the *Bundesrat* as the primary partner of the *Reichsleitung* in the framing of legislative proposals. The more the *Reichsleitung* converged with the *Reichstag*, the less the *Bundesrat* could shape federal legislation. Rather than on the state governments, the *Reichsleitung* began to rely on the majority parties in the parliament. This became clear in 1900 when the Second Naval Law was adopted.⁹⁸ After the state governments had failed to agree on how to finance the naval

⁹⁶ *Militärstrafgerichtsordnung*, 1 December 1898, RGBl. (1898), no. 53, pp. 1189-1288.

⁹⁷ On the framing process of the Military Code of Criminal Procedure, see Rauh, *Föderalismus*, pp. 151-207.

⁹⁸ *Gesetz, betreffend die deutsche Flotte*, 14 June 1900, RGBl. (1900), no. 21, pp. 255-9.

construction programme, the state secretary of the Federal Department of the Navy, Alfred von Tirpitz, approached the Centre Party for help. This was the very first time that in order to prepare a bill a member of the *Reichsleitung* undertook independent negotiations with the biggest *Reichstag* party.⁹⁹

The massive costs of the naval construction programme and of the ongoing colonial expansion made closer cooperation between the *Reichsleitung* and the *Reichstag* necessary anyway. Otherwise, parliamentary approval of the annual budget would have been uncertain. Moreover, the exploding national budget (see Figure 1) made it likely that the Reich would sooner or later need to redefine its financial system in order to generate more revenue. At the turn of the century, it was therefore likely that federal government would undergo major structural changes.

The reorganisation of federal affairs began with the *Reichsleitung* claiming control over the Prussian State Ministry after Hohenlohe's resignation in 1900. The ever-growing dependency of the Chancellor and the state secretaries on the *Reichstag* implied that they now had to prioritise national over Prussian interests as a matter of principle. Driven by this necessity, they tried to dominate the Prussian executive as much as possible. This became manifest in the so-called 'Staatssekretarisierung' of the Prussian cabinet. From 1900, the Prussian king and Emperor appointed an increasing number of state secretaries from the *Reichsämtner* Prussian ministers without portfolio.¹⁰⁰ By this practice – which the next chapter will analyse in more detail – they became full members of the State Ministry. As this council of ministers worked by majority vote, the infiltration of national executives was nothing else than a mediatisation of Prussia.¹⁰¹

⁹⁹ On the framing process of the Second Navy Law, see *ibid.*, 220-41, especially pp. 224, 229f.

¹⁰⁰ See *Protokolle (PSM)*, vol. 9 (October 1900- July 1909), p. 455 and vol. 10 (July 1909-November 1918), pp. 470f. On this practice, see Rosenau, *Hegemonie und Dualismus*, pp. 32-8.

¹⁰¹ See the letter by the Prussian envoy Graf von Schwerin to the Prussian foreign and prime minister Theobald von Bethmann Hollweg, 11 July 1914, printed in Goldschmidt, *Kampf*, no. 113, pp. 349f.

The loss of independence was reflected in the fact that more and more often the Prussian government was forced to adopt bills against its will. In 1905, for example, the state secretary of the Federal Department of the Interior, Arthur von Posadowsky-Wehner, forced the State Ministry to revise the Prussian mining law in order to put a stop to the general strike of the workers in the coal mines of the Ruhr region, which were crucial for the supply of the national armament industry.¹⁰²

The procedure of legislative negotiations too changed to Prussia's disadvantage. Proposals were no longer first discussed with the Prussian ministers and then referred to the relevant *Bundesrat* committee. Rather, negotiations shifted to the committees of the *Reichstag*, where the executives of the *Reichsämtler* could bargain with the parliamentary parties directly. Often, these consultations also included envoys of those state governments that had an interest in the matter at stake and whose votes were necessary to reach a majority in the *Bundesrat*.¹⁰³

This new practice of legislative negotiations reduced Prussia to the rank of a normal state. She was no longer able to act as a hegemon that could always impose her will on national government. The best example for Prussia's demise was perhaps the failed attempt of the State Ministry to introduce a federal levy on the usage of canals in 1909/10, a measure intended to protect the estates of the Junkers from cheap agricultural imports. While in 1878 the Prussian government had managed to force protective tariffs upon the union, it failed miserably forty years later, because the Prussian hegemony was no longer intact.¹⁰⁴

In the 1910s, this downgrading of Prussia led to a growing antagonism between the State Ministry and the *Reichsleitung*. This was mainly due to the fact that it became almost impossible for Chancellor Theobald von Bethmann Hollweg to satisfy the conservative interests of the Prussian House of Representatives while he had to deal with a *Reichstag* in

¹⁰² Rosenau, *Hegemonie und Dualismus*, p. 37.

¹⁰³ Henrich-Franke, "Wandlungen föderalen Regierens im Deutschen Kaiserreich. Die Entscheidungsfindung im Fall der Sozialgesetzgebung", pp. 380-2. On the influence of the states via such informal channels, see also Hähnel, Höfer, and Liedloff, "Föderale Mitbestimmung im Deutschen Kaiserreich - Der Einfluss der Länder auf die Reichsgesetzgebung".

¹⁰⁴ On the framing process of the levy on the usage of canals, see Rauh, *Parlamentarisierung*, pp. 55-122.

which the left-wing parties got stronger with each election. In this situation, the *Reichsleitung* not only treated Prussia more and more like any other state. But it also increasingly cooperated with other state governments in order to push legislative projects through the *Bundesrat*. Between 1909 and 1914, the cooperation with Bavaria became so close that the liberal Berlin newspaper *Vossische Zeitung* argued in March 1912 that ‘under the fifth Chancellor the hegemony in the German Empire has shifted from Prussia to Bavaria’.¹⁰⁵

At the same time as the *Reichsleitung* rose over the Prussian State Ministry, the state secretaries became more independent from the Chancellor. They took over an increasing number of responsibilities on their own rather than as his substitutes. There were two major reasons for this. From the turn of the century, the preparation of nearly all bills passed from the Prussian ministries to the *Reichsämtler*. Moreover, the cooperation between the *Reichsämtler* and the *Reichstag* grew closer every year, with the effect that the state secretaries evolved into independent negotiators. These developments enhanced their scope of action so much that they began to resemble proper federal ministers.¹⁰⁶

It seemed only a matter of time until this transformation would be completed, because after 1900 the *Reichstag* permanently replaced the *Bundesrat* as the centre of the legislature. Under the Chancellors Bülow and Bethmann Hollweg, the cooperation of the *Reichsleitung* with the majority parties reached the point of total dependency. Between 1900 and 1906/07, Bülow largely relied on the Centre Party and the Conservatives. During these years, the *Reichsleitung* established the practice of negotiating bills with the MPs before they entered the *Bundesrat*. This procedural marginalisation of the state governments became worse after the elections of 1907, when Bülow made his government dependent on the support of a fragile coalition of the conservatives, national liberals, and left liberals, the so-called ‘Bülow

¹⁰⁵ [‘Unter dem fünften Reichskanzler ist die Hegemonie im neuen Deutschen Reich von Preußen auf Bayern übergegangen.’] Quoted in *ibid.*, p. 154, fn. 23.

¹⁰⁶ *Ibid.*, pp. 32ff., 152f.

bloc'.¹⁰⁷ The dependency of the *Reichsleitung* on the parliament eventually reached its pre-war climax under Bethmann Hollweg, as he tried to govern on the basis of flexible majorities that included even the Social Democrats.¹⁰⁸

Due to the growing control of the *Reichstag*, the main priority of the *Reichsleitung* shifted from finding a common position with the state governments to reaching a compromise with the majority parties. This change of focus, which took place under the aegis of Arthur von Posadowsky-Wehner, Bülow's State Secretary of the Interior until 1907, put the *Bundesrat* in an increasingly bad position. While the *Reichstag* took as much time as it pleased to discuss the federal budget, the *Bundesrat* received the budgetary draft closer to the end of the fiscal period each year. The resulting time pressure made thorough negotiations impossible. Moreover, the *Reichsämtler* provided information about upcoming legislative projects no longer to the state governments, but to the parties that the *Reichsleitung* needed in order to secure a majority in the parliament. This practice gave the *Reichstag* more scope of action. In 1906, it amended a legislative proposal for the first time directly instead of referring it back to the *Bundesrat* and the national administration for corrections.¹⁰⁹

Around the same time, the *Reichstag* started to address more and more resolutions to the *Bundesrat*, above all regarding budgetary issues. This procedure added to the overload of administrative matters that the *Bundesrat* had to deal with as a consequence of the ongoing centralisation. As the number of public petitions about tax and customs matters skyrocketed in the 1900s, the *Bundesrat* became paralysed by the thousands of trifles it had to take care of every year. For example, it needed to approve the licence of each product that was launched

¹⁰⁷ On Bülow's reliance on first the Centre Party and then the bloc parties, see Heinrich August Winkler, *Der lange Weg nach Westen*, vol. 1: Deutsche Geschichte vom Ende des Alten Reiches bis zum Untergang der Weimarer Republik, 2 vols. (Beck, 2000), pp. 296-301. See also Rauh, *Föderalismus*, pp. 245-62, 298-346.

¹⁰⁸ On Bethmann Hollweg's scope of action in domestic policy, see Hans-Günter Zmarzlik, *Bethmann Hollweg als Reichskanzler, 1909-1914: Studien zu Möglichkeiten und Grenzen seiner innerpolitischen Machtstellung*, Beiträge zur Geschichte des Parlamentarismus und der politischen Parteien 11 (Düsseldorf: Droste, 1957).

¹⁰⁹ Rauh, *Parlamentarisierung*, pp. 18-22, 289.

in Germany and the pensions of all officials of the national administration, including the tens of thousands of customs and postal officers.¹¹⁰

The more the *Reichsleitung* turned away from the *Bundesrat* and toward the *Reichstag*, the harder it was for the state governments to make their interests heard. *Bundesfreundlichkeit* was no longer a central principle of federal government. The middling states were only occasionally included in the framing of legislative projects. For the small states, the situation was even worse. They played no role at all anymore.

In light of this marginalisation of the state governments, it is no surprise that the functional change of the federal constitutional organs further intensified the intrusion into the competences of the states, in particular in the field of finance. As the *Reichsleitung* now depended on the *Reichstag* anyway, the parliamentary parties that had defended the financial dependence of the *Reich* on the states in the Bismarckian era, above all the Centre Party, no longer opposed a reform of the fiscal system that would generate more national revenues. By 1909, the Franckenstein Clause had been gradually abolished, with the result that the states had lost their share in the revenues from customs and tariffs. At the same time, new federal taxes were introduced. Aside from creating new consumption taxes, for example on champagne, cigarettes, and matches, the *Reich* began to violate the monopoly of the states on direct taxation.¹¹¹ In 1906, the inheritance tax was practically transformed into a federal tax by determining that while the states retained the right to raise it, the *Reich* received the

¹¹⁰ See for example the table of contents in *Protokolle (DR)*, 1916, pp. 38f., which includes no less than three columns listing the federal officials whose pension the *Bundesrat* had to approve in 1916. On the *Bundesrat*'s overload of work, see also Rauh, *Parlamentarisierung*, pp. 22ff., 27ff.

¹¹¹ *Schaumweinsteuergesetz*, 9 May 1902, RGBl. (1902), no. 24, pp. 155-63. *Gesetz, betreffend die Ordnung des Reichshaushalts und die Tilgung der Reichsschuld*, 3 June 1906, RGBl. (1906), no. 31, pp. 620-74, appendix 2 'Zigarettensteuergesetz', pp. 631-42. *Zündwarensteuergesetzes*, 15 July 1909, RGBl. (1909), no. 44, pp. 814-24.

revenues from it.¹¹² Seven years later, a comprehensive fiscal reform introduced two proper direct federal taxes: a capital gains tax and an extraordinary defence contribution.¹¹³

These reforms made the Reich financially much more independent from the states. By the outbreak of the war, national receipts had swollen to around three billion Goldmark (see Figure 1), to which the states contributed no more than fifty-two million. Even though the level of independent national revenues was still low comparative to other European states and the Reich still suffered from considerable financial constraints, as Niall Ferguson has pointed out in the context of the debate on the outbreak of the world war, the *Reichsleitung* was no longer incapable of doing anything without the subsidies from the states.¹¹⁴ This growing financial independence of the federal government greatly reduced the influence of the states.¹¹⁵

How insignificant the monarchical state governments had become is reflected in the fact that their marginalisation did not affect the legislative productivity of federal government at all. To the contrary: due to the close cooperation between the *Reichsleitung* and the *Reichstag*, the output of federal laws was extremely high between 1890 and 1914 (see Table 2). In regulating the expanding federal administration and new fields in the rapidly growing industrial economy, the parliament often seized the initiative. The majority situation in the *Reichstag*, where the conservatives were greatly outnumbered by the Centre Party, the liberals, and the Social Democrats, very often gave the resulting laws a pronounced liberal

¹¹² *Gesetz, betreffend die Ordnung des Reichshaushalts und die Tilgung der Reichsschuld*, 3 June 1906, RGBl. (1906), no. 31, pp. 620-74, appendix 4 'Erbrechtssteuergesetz', pp. 654-74.

¹¹³ *Gesetz über den einmaligen außerordentlichen Wehrbeitrag* and *Gesetz zur Besteuerung des Vermögenszuwachses*, 3 July 1913, RGBl. (1913), no. 41, pp. 524-43 and 505-21.

¹¹⁴ Niall Ferguson, "Public Finance and National Security: The Domestic Origins of the First World War Revisited," *Past and Present* 142 (1994): 141-68. Ferguson's argument will be further considered in Chapter 5, which will show that the restriction of the national budget by the Franckenstein Clause was a gross violation of the constitution that was made possible by the lack of judicial review.

¹¹⁵ On the fiscal reforms between 1900 and 1914, see Peter-Christian Witt, *Die Finanzpolitik des Deutschen Reiches von 1903 bis 1913. Eine Studie zur Innenpolitik des Wilhelminischen Deutschland*, Historische Studien 415 (Lübeck & Hamburg: Matthiesen, 1970). For a brief overview, see Rosenau, *Hegemonie und Dualismus*, p. 102f. Two good contemporary accounts are the studies by the economics professor Karl Theodor von Eheberg, "Finanzen und Steuern," in *Deutschland unter Wilhelm II*, ed. Siegfried Körte et al., vol. 1, 3 vols. (Berlin: Hobbings, 1914), 99-120 and the lawyer Wilhelm Gerloff, *Die Reichsfinanzgesetzgebung von 1913* (Berlin: Springer, 1914).

and social character. Examples include the legalisation of the cooperation between domestic associations, the broadening of the accident insurance system, and the prohibition of most forms of child labour.¹¹⁶ The expansion of federal legislation therefore implied not only another wave of centralisation, but also – in terms of policy content – a great nationwide liberalisation, which made the states and their monarchical regimes appear backward.

Taken together, all the changes in the functions of the federal constitutional organs and in the competences of the Reich and the states meant that the federal structures that were supposed to contain parliamentary influence slowly dissolved. As a result, the *Reichstag* became more and more powerful. Bülow was the first Chancellor who resigned as a consequence of a defeat in parliament. When the coalition of his ‘bloc parties’ broke apart because of a disagreement about the fiscal reform in 1908/09, Bülow – who had fallen out with the Emperor over the Daily Telegraph Affair a few months earlier – left office. His resignation, which will be further discussed in Chapter 5, was a clear sign that due to the ever-increasing centralisation Germany had travelled halfway down the road to parliamentary government.¹¹⁷

Under Bethmann Hollweg, this transformation toward a fully-fledged parliamentary system gathered further pace. The parliamentary parties, above all the Social Democrats, used every possible opportunity to bring forward motions demanding that the Chancellor be made parliamentarily responsible. After the 1912 elections, a broad coalition ranging from the

¹¹⁶ *Gesetz, betreffend das Vereinswesen*, 11 December 1899, RGBL. (1899), no. 48, p. 699. *Gesetz, betreffend die Abänderung der Unfallversicherungsgesetze*, 30 June 1900, RGBL. (1900), no. 26, pp. 335–535. *Gesetz, betreffend die Unfallfürsorge für Gefangene*, 30 June 1900, RGBL. (1900), no. 26, pp. 536–45. *Unfallfürsorgegesetz für Beamte und für Personen des Soldatenstandes*, 18 June 1901, no. 26, pp. 211–16. *Gesetz, betreffend Kinderarbeit in gewerblichen Betrieben*, 30 March 1903, RGBL. (1903), no. 14, pp. 113–21.

¹¹⁷ Rauh, *Föderalismus*, p. 253 speaks of ‘semi-parliamentarism’ [‘Halbparlamentarismus’]. On the disintegration of the ‘Bülow bloc’ and Bülow’s resignation, see *ibid.*, pp. 331–46. On the impact of the Daily Telegraph Affair, see Terence F. Cole, ‘The Daily Telegraph Affair and its Aftermath: The Kaiser, Bülow and the Reichstag, 1908–1909,’ in *Kaiser Wilhelm II: New Interpretations: The Corfu Papers*, ed. John C. G. Röhl and Nicolaus Sombart (Cambridge: Cambridge University Press, 1982), 249–68. The Daily Telegraph Affair was a diplomatic and political crisis that was caused by an interview, in which William II insulted the British. The affair had a much bigger impact in Germany than abroad. Bülow – who as Chancellor was responsible for all official acts of the Kaiser – came under fire mainly because he had failed to authorise the interview.

Social Democrats to the national liberals amended the parliamentary by-laws. The new rules gave the *Reichstag* the right to pass a vote of no confidence against the Chancellor.¹¹⁸ Even though such a vote was not yet legally binding, this gave the parliament another important source of leverage, which it applied no less than three times before 1914, most famously in the context of the Saverne Affair (see Chapter 5).¹¹⁹

The main reason for this advance of parliamentary power was the marginalisation of the *Bundesrat* and the state governments. By the last years before the war, the federal structures of the constitution had disintegrated so much that it is difficult to speak of *federal* government at all. Rather, Germany now featured a centralised system of government that was managed by the *Reichsleitung* and the *Reichstag* and that reduced the state governments to mere bystanders.

This state of affairs became obvious in the negotiations of the last great reform project before the war: the introduction of the aforementioned capital gains tax in 1913. In order to satisfy the state governments, the Chancellor and the state secretaries decided to support a proposal of the *Bundesrat*, which wanted to increase the subsidy payments for the Reich. But they only did so because they knew that the majority parties of the *Reichstag* would reject the proposal anyway and replace it by a bill that suggested the introduction of another direct federal tax. This triangle strategy of the *Reichsleitung* treated the *Bundesrat* as an ordinary upper house and made the states appear as a superfluous appendix of a system of centralised government.¹²⁰

In light of this erosion of federal structures, Clemens von Delbrück, state secretary of the Federal Department of the Interior, proposed a total revision of the constitution in May 1914. His ideas centred on establishing new forums of communication that would allow the *Reichsämtler*, the Chancellor, and the *Reichstag* to coordinate their activities better. Most

¹¹⁸ § 33a. See Bernhard Jungheim, ed., *Die Geschäftsordnung für den Reichstag mit Anmerkungen* (Berlin: Reichsdruckerei, 1916), pp. 86f.

¹¹⁹ Rauh, *Parlamentarisierung*, pp. 185ff.

¹²⁰ On the framing process of the capital gains tax, see *ibid.*, pp. 240-85, especially pp. 269f.

important, he argued, would be the creation of regular cabinet meetings of the state secretaries and the Chancellor and the foundation of institutions that would facilitate the negotiation of legislative proposals between the *Reichsleitung* – which he called ‘government’ – and the *Reichstag*, where the Social Democrats had become the biggest fraction in the 1912 election. The monarchical governments and the *Bundesrat* played absolutely no role in his plans.¹²¹ This lack of consideration demonstrates that the federal structures of the constitution had become obsolete and that the rise of parliamentary government was in full swing. Only the outbreak of the war three months later prevented a fundamental reform of the German constitutional system.

II. Wartime Collapse: The Implosion of the Imperial State and the Introduction of Responsible Government (1914-1918)

The wartime order of government was based on the Enabling Act of 4 August 1914:

The *Bundesrat* is empowered to decree during the time of the war legal measures that are deemed necessary in order to prevent economic damage. These measures must be brought to the knowledge of the *Reichstag* in its next meeting and must be revoked on its demand.¹²²

As more or less any public activity was related to the wartime economy, this inconspicuous regulation gave the *Bundesrat* the power to issue decrees in all fields of government. The Enabling Act thus returned to the *Bundesrat* its status as the central executive organ of federal government, a renaissance that was reflected in the flood of petitions that it received from

¹²¹ On Delbrück’s memorandum, see *ibid.*, pp. 38-43.

¹²² [‘Der Bundesrat wird ermächtigt, während der Zeit des Krieges diejenigen gesetzlichen Maßnahmen anzuordnen, welche sich zur Abhilfe wirtschaftlicher Schädigung als notwendig erweisen. Diese Maßnahmen sind dem Reichstag bei seinem nächsten Zusammentritt zur Kenntnis zu bringen und auf sein Verlangen aufzuheben.’] *Gesetz über die Ermächtigung des Bundesrats zu wirtschaftlichen Maßnahmen und über die Verlängerung der Fristen des Wechsel- und Scheckrechts im Falle kriegerischer Ereignisse*, 4 August 1914, RGBl. (1914), no. 53, §, 3, p. 327. See also *Protokolle (DR)*, 1914, session 30, 4 August, § 696, p. 424f.

concerned citizens during the war.¹²³ At the same time, the statute took account of the prominent position that the *Reichstag* had gained over the last decades by giving the parliament a veto power.¹²⁴

But the recovery of the *Bundesrat*'s central constitutional position did not mean that the monarchical governments were put in charge of national politics again. To the contrary: as the *Bundesrat* had long become a subservient instrument of the *Reichsleitung*, the Enabling Act empowered the Chancellor and the state secretaries rather than the monarchical governments. By 1914, almost all Prussian plenipotentiaries were executives from the federal administration, as we will see in the next chapter. This domination of the Prussian bench enabled the *Reichsleitung* to impose its will upon the *Bundesrat* whenever it deemed it necessary. Moreover, similar to the *Reichstag* parties, the state governments declared their universal support for the wartime efforts of the *Reichsleitung*.¹²⁵ In contrast to the MPs on the extreme right and left, the state governments kept this pledge throughout the war and passed every important decision in the *Bundesrat* unanimously, even though the *Reichsleitung* and the *Reichstag* excluded them completely from the negotiations of bills.

The Enabling Act so enhanced the reach of the *Reichsleitung* that it gained the status of an official national government. In 1915, presidential proposals started to speak of a 'Reichsregierung' for the first time. One year later, Chancellor Georg von Hertling introduced regular cabinet meetings of the state secretaries.¹²⁶

By officially adopting the status of a government, the *Reichsleitung* became more and more accountable to the *Reichstag*. Taking advantage of the wartime pressure on the executive, which intensified the more difficult the military situation became, the national

¹²³ To gain an impression of the sheer number of petitions, see any wartime meeting in *Protokolle (DR)*, 1914-1918. Petitions are listed at the end of each protocol.

¹²⁴ On the Enabling Act, which – relative to its importance – has received little scholarly attention, see Michael Frehse, *Ermächtigungsgesetzgebung im Deutschen Reich 1914-1933* (Pfaffenweiler: Centaurus, 1985), pp. 299ff. and Huber, *Verfassungsgeschichte*, vol. 3, pp. 928ff. and vol. 5, pp. 33-8, 62-73.

¹²⁵ See the speech by Chancellor Theobald von Bethmann Hollweg in the *Bundesrat* and the subsequent approval by the states in *Protokolle (DR)*, 1914, session 27, 1 August, § 664, pp. 405-406b.

¹²⁶ Rauh, *Parlamentarisierung*, pp. 311, 324f., especially fn. 104. See also the analysis by Goldschmidt, *Kampf*, pp. 66, 123.

parliament constantly increased its control over the Chancellor and the state secretaries by bombarding them, for example, with interpellations and by forcing them to collaborate with various parliamentary committees. Most important were the budgetary commission or *Hauptausschuß*, which gained the right to discuss foreign policy matters in 1916, and the *Interfraktionelle Ausschuß*, a bipartisan committee that pushed for the introduction of a legal responsibility of the national government. Within the first two and a half years of the war, these committees integrated parliamentarians more closely than ever before into the formulation of federal policies.¹²⁷

This integration further diminished the role of the state governments. Under Bethmann Hollweg, it became normal practice that the *Reichsleitung* negotiated proposals for emergency decrees with the whips of the parliamentary parties before informing the *Bundesrat* about the upcoming measures.¹²⁸ Political decision-making during the war no longer included the state governments, but took place between the *Reichsleitung*, the *Reichstag*, and the Supreme Army Command.

In this triangular relationship, the power of the *Reichsleitung* and the Supreme Army Command gradually shrank while they fought over the governmental authority over Germany. Since the Chancellor refused to undertake a reform of the constitutional system, he could not rely on the full support of the parliamentary parties in this conflict. As a result, the *Reichsleitung* was slowly worn down by the Supreme Army Command's bid for power on the one hand and the increasing pressure from the centre-left parties, which called for the introduction of parliamentary government and the abolition of the Prussian three-class

¹²⁷ On this development, see Reinhard Schiffers, *Der Hauptausschuß des Deutschen Reichstags 1915-1918: Formen und Bereiche der Kooperation zwischen Parlament und Regierung*, Beiträge zur Geschichte des Parlamentarismus und der politischen Parteien 67 (Düsseldorf: Droste, 1979); Udo Bermbach, *Vorformen parlamentarischer Kabinettsbildung in Deutschland. Der interfraktionelle Ausschuß 1917/18 und die Parlamentarisierung der Reichsregierung* (Cologne: Isar, 1967); Klaus Epstein, "Der Interfraktionelle Ausschuss und das Problem der Parlamentarisierung 1917-1918," *HZ* 191 (1960): 562-84; and Rauh, *Parlamentarisierung*, pp. 344ff. For a collection of relevant sources, see Erich Matthias and Rudolf Morsey, eds., *Der Interfraktionelle Ausschuss 1917-18*, 2 vols., Quellen zur Geschichte der Parlamentarismus und der politischen Parteien 1 (Düsseldorf: Droste, 1959).

¹²⁸ Rauh, *Parlamentarisierung*, pp. 328ff., 337f.

franchise, on the other. This problem became manifest when Chancellor Bethmann Hollweg had to withdraw from office in July 1917 after he had failed to find enough backing in parliament for his rejection of the Army Command's call for unrestricted submarine warfare.¹²⁹

The crumbling position of the *Reichsleitung* did not mean, however, that the Army Command came to determine the course of national government on its own. It never succeeded in establishing a military dictatorship.¹³⁰ Rather, its control over the *Reichsleitung* fluctuated, depending on the persons in charge and the military situation. In 1917, the dominance of the Army Command reached its peak, not least thanks to the support of the Kaiser, who was easy to manipulate and – as Supreme Warlord or *Oberster Kriegsherr* – failed to coordinate the military and civilian leadership. The two commanding generals, Paul von Hindenburg and Erich Ludendorff, dictated many crucial decisions to William II, not least the acceptance of Bethmann Hollweg's resignation.¹³¹

But the supremacy of the Army Command depended on military success. When defeat became imminent in summer 1918, its power swiftly dissipated. Since the conflict over governmental authority had also greatly weakened the *Reichsleitung*, the demise of the military leadership left the *Reichstag* as the only nationwide institution still capable of political decision-making.¹³²

¹²⁹ Ibid., pp. 309f. On Bethmann Hollweg's downfall, see Clark, *Kaiser Wilhelm*, pp. 236-8.

¹³⁰ See Roger Chickering, *Imperial Germany and the Great War, 1914-1918*, 3rd ed., New Approaches to European History (Cambridge: Cambridge University Press, 2014), pp. 76f. and Wilhelm Deist, ed., *Militär und Innenpolitik im Weltkrieg 1914-18*, vol. 1, 2 vols., Quellen zur Geschichte des Parlamentarismus und der politischen Parteien: Militär und Politik, 1/1 (Düsseldorf: Droste, 1970), pp. LXIVff. The traditional view that Hindenburg and Ludendorff did succeed in establishing a military dictatorship, at least in political terms, dominated historical writing on the war for a long time and still persists. See the classic work by Gerhard Ritter, *Staatskunst und Kriegshandwerk*, 2., vol. 3: "Die" Tragödie der Staatskunst. Bethmann Hollweg als Kriegskanzler (1914-1918), 4 vols. (München: Oldenbourg, 1964), p. 551 and - as a recent example - the biographical study by John Lee, *The Warlords: Hindenburg and Ludendorff* (London: Weidenfeld & Nicolson, 2005).

¹³¹ See Clark, *Kaiser Wilhelm*, pp. 237f. On the relationship of the Supreme Army Command and the *Reichsleitung* in general, see Erwin Direnberger, *Oberste Heeresleitung und Reichsleitung 1914-1918* (Berlin: Junker & Dünnhaupt, 1939).

¹³² Rauh, *Parlamentarisierung*, pp. 326, 352ff, 362.

For the constituent states, the system of wartime government was a further blow. The emergency decree power of the Reich made obsolete the constitutionally guaranteed distribution of competences. Decrees and laws issued in reference to wartime necessity regularly infringed on the competences of the states. Extraordinary defence contributions and new consumption taxes, for example on mineral water, violated the remaining authority of the states over direct taxation in order to cover the exploding costs of the war.¹³³ Moreover, the declaration of the state of war on 31 July 1914 transferred most executive functions of the state governments to military governors. These were responsible to the Kaiser only, except for in Bavaria where – as a consequence of the kingdom's special rights under the constitution – the governor was subordinate to the minister of war.¹³⁴

The governors were the heads of a system of military administration that competed with the civilian administration for resources and staff. The chief loser in money and expertise was the Prussian ministry of war, because the military authorities took over most of its subordinated special agencies. But this system of military administration proved so inefficient that it was abolished after less than two years. When the peacetime structures were gradually re-established in 1916, starting in the area of food supply, this occasion was used to centralise the administration of military affairs. The most important element of this centralisation was

¹³³ Frehse, *Ermächtigungsgesetzgebung im Deutschen Reich 1914-1933*, pp. 28-35. For the introduction of an extraordinary defence contribution, see *Protokolle (DR)*, 1918, session 40, 19 July, § 662, p. 423 and *Gesetz über eine außerordentliche Kriegsabgabe für das Rechnungsjahr 1918*, 26 July 1918, RGBl. (1918), no. 101, 964-74. For the introduction of the tax on mineral water, see *Protokolle (DR)*, 1918, session 40, 19 July, § 656, p. 421 and attachment 5, pp. 467ff as well as *Gesetz, betreffend die Besteuerung von Mineralwässern und künstlich bereiteten Getränken sowie die Erhöhung der Zölle für Kaffee und Tee*, 26 July 1918, RGBl. (1918), no. 97, pp. 849-61.

¹³⁴ *Verordnung, betreffend die Erklärung des Kriegszustandes*, 31 July 1914, RGBl. (1914), no. 47, p. 263. *Königlich-bayerische Verordnung betreffend die Verhängung des Kriegszustands in Bayern*, 31 July 1914, and *Königlich-bayerische Verordnung betreffend den Übergang der vollziehenden Gewalt auf die Militärbehörden in Bayern*, 31 July 1914, printed in Huber, *Dokumente*, vol. 3, no. 71f., pp. 127f. On the legal and institutional consequences of the state of war, see Christian Schudnagies, *Der Kriegs- oder Belagerungszustand im Deutschen Reich während des Ersten Weltkrieges: eine Studie zur Entwicklung und Handhabung des deutschen Ausnahmezustandsrechts bis 1918*, Rechtshistorische Reihe 115 (Frankfurt am Main: Lang, 1994).

the foundation of a special department in the Prussian ministry of war, the *Kriegsamt*, which was made responsible for the few remaining military competences of the states.¹³⁵

In all areas but military affairs, the wartime centralisation did not make use of Prussian institutions, but created several new federal departments: the Wartime Agency of Food Supply (*Kriegsernährungsamt*) was founded in May 1916; the Federal Department of Economics (*Reichswirtschaftsamt*) in August 1917; and the Federal Department of Labour (*Reichsarbeitsamt*) in October 1918 (see Table 3).

The state that felt this expansion of the national administration most keenly was Prussia. While the other states simply became even more marginalised than before, she was mediatised. Since the *Reichsämt* lacked their own apparatus of supporting agencies, they simply incorporated the relevant institutions of the Prussian administration. This development began in the field of wartime food supply, but soon spilled over to other areas.¹³⁶ In these fields, Prussia lost her independence and was transformed into a territory that stood under the direct control of the national government, a status similar to that of Alsace-Lorraine and the colonies.¹³⁷

At the same time, the coordination between the Prussian State Ministry and the *Reichsleitung* was lost altogether. After Clemens von Delbrück, State Secretary of the Federal Department of the Interior, had resigned in May 1916, his office as vice-president of the State Ministry was never again taken over by a member of the *Reichsleitung*.¹³⁸ The result of the dissolution of this personal union, which had been crucial for the harmonious management of the Prussian and national governments, was a disaster. As the State Ministry became largely

¹³⁵ On the system of military administration, see Roger Chickering, *Imperial Germany and the Great War, 1914-1918*, pp. 33-35 and Wilhelm Deist's source collection *Militär und Innenpolitik im Weltkrieg 1914-18*, which examines all important institutional problems. See also Rauh, *Parlamentarisierung*, pp. 300ff., 316-18.

¹³⁶ See the letter by the president of the Wartime Agency of Food Supply Adolf Tortilowicz von Batocki-Friebe to Chancellor Theobald von Bethmann Hollweg, 31 January 1917, printed in Goldschmidt, *Kampf*, no. 115, p. 351f.

¹³⁷ Rauh, *Parlamentarisierung*, pp. 311-14, and especially 415 f.

¹³⁸ *Protokolle (PSM)*, vol. 10 (July 1909-November 1918), p. 469. See Delbrück's letter of resignation to Chancellor Theobald von Bethmann Hollweg, 14 November 1915, printed in Goldschmidt, *Kampf*, no. 114, pp. 350f. On Delbrück's resignation, see also Goldschmidt's interpretation, *ibid.*, pp. 116-8.

excluded from national decision-making, it engaged in a permanent fight with the *Reichsleitung* that made wartime government all the more difficult. The newly created cabinet meetings of the state secretaries spent most of their time settling disagreements between Prussian and federal institutions about conflicting competences. Some of these disputes were simply grotesque. When defeat at the Western front was imminent in autumn 1918, the Prussian minister of finance complained that the state secretary of the Federal Treasury had passed internal information of the State Ministry on to Georg von Hertling in a letter that was addressed to the Chancellor rather than the Prussian prime minister. As Hertling held both offices, this complaint was not only bizarre, in particular at that point in time, but also a clear sign of how paralysed the relations between the Prussian and federal executive had become.¹³⁹

In combination with each other, the exclusion of the Prussian State Ministry from national decision-making, the downgrading of the *Bundesrat* to a rubber stamp, and the enormous centralisation resulting from the war changed the constitutional system to the effect that Germany was no longer governed as a federal, but as a unitary state. This collapse of the federal order – the structural framework designed to make parliamentary government impossible – enabled the *Reichstag* to penetrate the national executive from 1917 onwards. The Chancellors Georg Michaelis (July-November 1917) and Georg von Hertling (November 1917-September 1918) made parliamentarians part of their staff. Hertling himself had been an MP for the Centre Party. His was the first cabinet that became appointed after consulting the majority parties in the *Reichstag*. Even though he rejected a constitutional reform towards the introduction of parliamentary government, he put confidants of the majority parties in key positions of the federal administration. Friedrich von Payer, MP for the left liberals, became Hertling's Vice-Chancellor in November 1917. In this position, Payer was the first

¹³⁹ See the letter by the Prussian minister of finance Oskar Hergt to the Prussian prime minister Georg von Hertling, 28 June 1918, printed in *ibid.*, no. 116, pp. 353f.

parliamentarian to preside over the meetings of the *Bundesrat* – even though he was not a member of the Prussian cabinet.¹⁴⁰

Hertling's successor Max von Baden (October-November 1918), the last Chancellor of the Empire, appointed parliamentarians as state secretaries for the first time. In addition, several representatives of the biggest parliamentary parties entered the cabinet without taking over a department, among them such prominent figures as the Social Democrat Philipp Scheidemann and Matthias Erzberger of the Centre Party, who later proclaimed the republic and headed the armistice commission, respectively.¹⁴¹

At the same time as MPs entered the national executive, the *Reichstag* further expanded its power via the various wartime committees. Already in 1917, the parliament appointed as many members to the newly created war council, the *Siebenerausschuß*, as the *Reichsleitung*. In the context of the discussion about a reform of the Prussian three-class franchise, the *Reichstag* created a constitutional committee. Having expanded its competences step by step, the committee eventually made concrete proposals of how to make the *Reichsleitung* legally responsible to the parliament in May 1917.¹⁴²

Fifteen months later, when the situation at the front had become hopeless, the draft of a new enabling act determined that both the *Bundesrat* and the *Reichsleitung* would be put under the control of the *Reichstag*.¹⁴³ The system-changing reform eventually came in October 1918. Under the pressure of military defeat, the looming revolution, and the decision

¹⁴⁰ On the integration of parliamentarians into the executive under Hertling, see Rauh, *Parlamentarisierung*, pp. 407-21, especially p. 412f. On Hertling's chancellorship more generally, see the account by his son Karl von Hertling, *Ein Jahr in der Reichskanzlei: Erinnerungen an die Kanzlerschaft meines Vaters* (Freiburg: Herder, 1919).

¹⁴¹ On the development under Max von Baden, see Erich Matthias and Rudolf Morsey, *Die Regierung des Prinzen Max von Baden* (Düsseldorf: Droste, 1962) and Rauh, *Parlamentarisierung*, pp. 422-69.

¹⁴² On the *Siebenerausschuß* and the constitutional committee, see Rauh, *Parlamentarisierung*, pp. 345ff, 365-76. On the *Siebenerausschuß*, see also Bermbach, *Vorformen parlamentarischer Kabinettsbildung in Deutschland*, pp. 130ff.

¹⁴³ *Drucksachen (DR)*, 1918, vol. 2, no. 179. On the draft, see Rauh, *Parlamentarisierung*, p. 421.

of the American President Woodrow Wilson to negotiate about peace only with a democratic government, the Chancellor was made responsible to the parliament.¹⁴⁴

One consequence of this galloping development towards the introduction of responsible government in the last two years of the war was that the state governments sank into total insignificance. It became practice, for example, that the *Reichstag* committees voted on legislative proposals before the *Bundesrat* had even seen them. After summer 1917, hardly any higher-ranking executive of the state governments attended the *Bundesrat* meetings. It did not make sense for them to do so, because the *Reichsleitung* granted the *Bundesrat* so little time for voting on proposals that a proper review was impossible. Besides, the *Reichsleitung* now dealt with the representatives of economic, social, and other interest groups from the states directly rather than via their state governments.¹⁴⁵

In spring 1918, the governments of Bavaria, Saxony, Württemberg, Baden, and Hesse made one last attempt to reverse the situation by preparing a joint declaration that condemned the exclusion of the states from the legislative and executive decision-making process. But before they could agree on the right time to issue the protest note, Germany's military defeat and the November Revolution had made the whole plan obsolete.¹⁴⁶ The imperial state had imploded.

The readiness with which the revolutionaries seized the reins in 1918/19 shows that the *Reichstag* had moved to the centre of national decision-making long before. Otherwise, parliamentarians could not have been so prepared to take over the executive. Indeed, the rise of parliamentary government had begun immediately after the adoption of the constitution. It

¹⁴⁴ *Gesetz zur Abänderung der Reichsverfassung*, 28 October 1918, RGBl. (1918), no. 144, pp. 1274f. See also *Protokolle (DR)*, 1918, session 55, 8 October, § 904, p. 1435 and *Drucksachen (DR)*, 1918, vol. 2, no. 203. On the three notes issued by Wilson in response to the German request for an armistice, see Bullitt Lowry, *Armistice 1918* (Kent, Ohio and London: Kent State University Press, 1999), pp. 26-42. The third note demanded far-reaching constitutional reforms, which aimed for the creation of a German republic.

¹⁴⁵ Rauh, *Parlamentarisierung*, pp. 413ff.

¹⁴⁶ *Ibid.*, pp. 420f.

came about by five developments, which unfolded simultaneously and were related to each other. First, the centre of government shifted from the states to the national level, because the latter steadily gained competences at the expense of the former. Secondly, this centralisation strengthened the *Reichstag* and – thirdly – led to the emergence of a national government, the *Reichsleitung*. Fourthly, the resulting cooperation between the parliament, the Chancellor, and the state secretaries pushed the *Bundesrat* to the margins of national decision-making. As the council of state governments could thus no longer shield the national executive from parliamentary control, the *Reichsleitung* – fifthly – became dependent on the *Reichstag*.

What does this complex process mean for the historiographical debate on parliamentarisation? What is left of Rauh's thesis and the arguments of his critics? Rauh was right to point out that, in the context of the disintegration of federal structures, the *Reichstag* expanded its influence so much over the years that it came to control the national government. But his thesis has two great flaws. On the one hand, its timeframe is wrong. The rise of parliamentary government did not start in the Wilhelmine era, but already under Bismarck. The centralisation that brought it about set in the minute the constitution had been adopted in 1867.

On the other hand, by looking at the development of federal government solely from the perspective of the *Reichstag*, Rauh has missed the point. The driving factor behind the change of Germany's system of government was not a 'silent parliamentarisation', but a 'silent federalisation', meaning the emergence of a national government and the subsequent concentration of power therein. This federalisation, which was brought about by the steady shift of competences from the states to the national level (centralisation) and by the resulting reconfiguration of the functions of the federal constitutional organs, made the increasing control of the *Reichstag* over the executive possible in the first place, because it dissolved the constitutional structures that stood in the way of parliamentarisation.

If federalisation rather than parliamentarisation was the central problem of imperial government, this means that Rauh's critics too have been misguided. There is no way to deny the Empire's centralisation and the expansion of parliamentary power that resulted from it. From which point in time onwards we speak of parliamentary government depends on what degree of parliamentary control over the executive we deem necessary for this classification. Is it the dependency of the executive on the parliament as the main partner for the framing and adoption of laws? Or the integration of parliamentarians into the executive? Or the legal responsibility of the government to the parliament? Depending on our answer, parliamentary government was established in the 1900s, in the course of 1917, or in October 1918, respectively. Regardless of what view we take, it remains a matter of fact that federalisation led to parliamentarisation.

Hence, one cannot uphold the argument that, because of the relative strength or weakness of the democratisation of German society, a parliamentarisation of the Empire's governing institutions did not happen before the war. Federalisation was independent of democratisation, and parliamentarisation resulted from the former rather than the latter. Historians should therefore redefine their focus and pay more attention to the development of the federal context when discussing the evolutionary potential of the Empire's constitutional system.

The next two chapters of this book will try to contribute to such a reorientation of the historiographical debate by establishing a better understanding of the process of federalisation. While the next chapter will examine the mechanisms by which the national government gained control over the *Bundesrat*, the last chapter will show what consequences the lack of a constitutional court had for federal evolution.

Table 2: Evolution of National Legislation, 1867-1914

| Period | Selection of Important Pieces of National Legislation |
|-----------|---|
| 1867-1870 | <ul style="list-style-type: none"> • <i>Gesetz, betreffend die privatrechtliche Stellung der Erwerbs- und Wirtschaftsgenossenschaften</i>, 4 July 1868, BGBl. (1868), no. 24, pp. 415-33. • <i>Gesetz, betreffend die Einführung der Allgemeinen Deutschen Wechsel-Ordnung, der Nürnberger Wechsel-Novellen und des Allgemeinen Deutschen Handelsgesetzbuchs als Bundesgesetz</i>, 5 June 1869, BGBl. (1869), no. 32, pp. 379-81. • <i>Gewerbeordnung für den Norddeutschen Bund</i>, 21 June 1869, BGBl. (1869), no.26, pp. 245-82. • <i>Strafgesetzbuch für den Norddeutschen Bund</i>, 31 May 1870, BGBl. (1870), no. 16, pp. 197-273. • <i>Gesetz über den Unterstützungswohnsitz</i>, 6 June 1870, BGBl. (1870), no. 20, pp. 360-73. • <i>Gesetz, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften</i>, 11 June 1870, BGBl. (1870), no. 21, pp. 375-86. • <i>Gesetz, betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken</i>, 11 June 1870, BGBl. (1870), no. 19, pp. 339-53. |
| 1870s | <ul style="list-style-type: none"> • <i>Seemannsordnung</i>, 27 December 1872, RGBl. (1872), no. 33, pp. 409-32. • <i>Münzgesetz</i>, 9 July 1873, RGBl. (1873), no. 22, pp. 233-40. • <i>Lex Miquel-Lasker</i>, 20 December, RGBl. (1873), no. 34, p. 379. • <i>Gesetz über die Presse</i>, 7 May 1874, RGBl. (1874), no. 16, pp. 65-72. • <i>Strandungsordnung</i>, 17 May 1874, RGBl. (1874), no. 17, pp. 73-83. • <i>Gesetz über Markenschutz</i>, 30 November 1874, RGBl. (1874), no. 28, pp. 143-6. • <i>Gesetz über die Beurkundung des Personenstands und die Eheschließung</i>, 6 February 1875, RGBl. (1875), no. 4, pp. 23-40. • <i>Bankgesetz</i>, 14 March 1875, RGBl. (1875), no. 15, pp. 177-98. • <i>Gesetz, betreffend das Urheberrecht an Werken der bildenden Künste</i>, 9 January 1876, RGBl. (1876), no. 2, pp. 4-8. • <i>Gesetz, betreffend den Schutz der Photographien gegen unbefugte Nachbildung</i>, 10 January 1876, RGBl. (1876), no. 2, pp. 8-10. • <i>Gesetz, betreffend das Urheberrecht an Mustern und Modellen</i>, 11 January 1876, RGBl. (1876), no. 2, pp. 11-14. • <i>Reichsjustizgesetze: Gerichtsverfassungsgesetz</i>, 27 January 1877, RGBl. (1877), no. 4, pp. 41-76; <i>Civilprozeßordnung</i>, 30 January 1877, RGBl. (1877), no. 6, pp. 83-243; <i>Strafprozeßordnung</i>, 1 February 1877, RGBl. (1877), no. 8, pp. 253-346; <i>Konkursordnung</i>, 10 February 1877, RGBl. (1877), no. 10, pp. 351-89; <i>Gesetz, betreffend die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Konkursverfahrens</i>, 21 July 1879, RGBl. (1879), no. 30, pp. 277-80. • <i>Patentgesetz</i>, 25 May 1877, RGBl. (1877), no. 23, pp. 501-10. • <i>Gesetz, betreffend die Vertretung des Reichskanzlers</i>, 17 March 1878, RGBl. (1878), no. 4, pp. 7f. • <i>Gerichtskostengesetz</i>, 18 June 1878, RGBl. (1878), no. 22, pp. 141-65. • <i>Gebührenordnung für Gerichtsvollzieher</i>, 24 June 1878, RGBl. (1878), no. 22, pp. 166-72. • <i>Gebührenordnung für Zeugen und Sachverständige</i>, 30 June 1878, RGBl. (1878), no. 22, pp. 173-6. • <i>Rechtsanwaltsordnung</i>, 1 July 1878, RGBl. (1878), no. 23, pp. 177-98. • <i>Gebührenordnung für Rechtsanwälte</i>, 7 July 1879, RGBl. (1879), no. 23, pp. 176-92. • <i>Gesetz, betreffend den Zolltarif des Deutschen Zollgebiets und den Ertrag der Zölle und der Tabaksteuer</i>, 15 July 1879, RGBl. (1879), no. 27, pp. 207-44. |
| 1880s | <ul style="list-style-type: none"> • <i>Gesetz, betreffend die Abwehr und Unterdrückung von Viehseuchen</i>, 23 June 1880, RGBl. (1880), no. 16, pp. 153-68. • <i>Gesetz, betreffend die Krankenversicherung der Arbeiter</i>, 15 June 1883, RGBl. (1883), no. 9, pp. 73-104. • <i>Gesetz gegen den verbrecherischen und gemeingefährlichen Gebrauch von Sprengstoff</i>, 9 June 1884, RGBl (1884), no. 17, pp. 61-4. • <i>Unfallversicherungsgesetz</i>, 6 July 1884, RGBl. (1884), no. 19, pp. 69-111. • <i>Gesetz, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften</i>, 18 July 1884, RGBl. (1884), no. 22, pp. 123-70. • <i>Aichordnung für das Deutsche Reich</i>, 27 December 1884, RGBl. (1885), no. 5, attachment to p. 14, pp. I-LVIII. • <i>Gesetz über die Ausdehnung der Unfall- und Krankenversicherung</i>, 28 May 1885, RGBl. (1885), no. 19, pp. 159-64. • <i>Gesetz, betreffend die Rechtsverhältnisse der deutsche Schutzgebiete</i>, 17 April 1886, RGBl. (1886), no. 10, pp. 75f. • <i>Gesetz, betreffend die Unfall- und Krankenversicherung der in land- und forstwirtschaftlichen Betrieben beschäftigten Personen</i>, 5 May 1886, RGBl. (1886), no. 14, pp. 132-78. • <i>Gesetz, betreffend die Unfallversicherung der bei Bauten beschäftigten Personen</i>, 11 July 1887, RGBl. (1887), no. 25, pp. 287-306. • <i>Gesetz, betreffend die Unfallversicherung der Seeleute und anderer bei der Seeschifffahrt</i> |

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| | <p><i>beteiligter Personen</i>, 13 July 1887, RGBL (1887), no. 27, pp. 329-73.</p> <ul style="list-style-type: none"> • <i>Gesetz, betreffend den Schutz von Vögeln</i>, 22 March 1888, RGBL (1888), no. 13, pp. 111-14. • <i>Gesetz, betreffend die Erwerbs- und Wirtschaftsgenossenschaften</i>, 1. May 1889, RGBL (1889), no. 11, pp. 55-93. • <i>Gesetz, betreffend die Invaliditäts- und Altersversicherung</i>, 22 June 1889, RGBL (1889), no. 13, pp. 97-144. |
| 1890s | <ul style="list-style-type: none"> • <i>Neufassung des Patentgesetzes</i>, 7 April 1891, RGBL (1891), no. 12, pp. 79-90. • <i>Gesetz, betreffend den Schutz von Gebrauchsmustern</i>, 1 June 1891, RGBL (1891), no. 18, pp. 290-3. • <i>Gesetz, betreffend die Gesellschaften mit beschränkter Haftung</i>, 20 April 1892, RGBL (1892), no. 24, pp. 477-99. • <i>Gesetz zum Schutz der Waarenbezeichnungen</i>, 12 May 1894, RGBL (1894), no. 22, pp. 441-8. • <i>Gesetz, betreffend die Abzahlungsgeschäfte</i>, 16 May 1894, RGBL (1894), no. 23, pp. 450f. • <i>Gesetz zur Bekämpfung des unlauteren Wettbewerbs</i>, 27 May 1896, RGBL (1896), no. 13, pp. 145-9. • <i>Börsengesetz</i>, 22 June 1896, RGBL (1896), no. 15, pp. 157-76. • <i>Bürgerliches Gesetzbuch</i>, 18 August 1896, RGBL (1896), no. 21, pp. 195-603. • <i>Gesetz über die Zwangsversteigerung und Zwangsverwaltung</i>, 24 March 1897, RGBL (1897), no. 14, pp. 97-134. • <i>Grundbuchordnung</i>, 24 March 1897, RGBL (1897), no. 15, pp. 139-157. • <i>Handelsgesetzbuch</i>, 10 May 1897, RGBL (1897), no. 23, pp. 219-436. • <i>Gesetz, betreffend das Auswanderungswesen</i>, 9 June 1897, RGBL (1897), no. 26, pp. 463-72. • <i>Gesetz, betreffend die deutsche Flotte</i>, 10 April 1898, RGBL (1898), no. 15, pp. 165-168. • <i>Gesetz, betreffend die Angelegenheiten der freiwilligen Gerichtsbarkeit</i>, 17 May 1898, RGBL (1898), no. 21, pp. 189-229. • <i>Militärstrafgerichtsordnung</i>, 1 December 1898, RGBL (1898), no. 53, pp. 1189-1288. • <i>Hypothekenbankgesetz</i>, 13 July 1899, RGBL (1899), no. 32, pp. 375-91. • <i>Invalidenversicherungsgesetz</i>, 13 Juli 1899, RGBL (1899), no. 33, pp. 393-462. • <i>Gesetz, betreffend die gemeinsamen Rechte der Besitzer von Schuldverschreibungen</i>, 4 December 1899, RGBL (1899), no. 47, pp. 691-8. • <i>Gesetz, betreffend das Vereinswesen</i>, 11 December 1899, RGBL (1899), no. 48, p. 699. • <i>Telegraphenwegegesetz</i>, 18 December 1899, RGBL (1899), no. 51, pp. 705-10. • <i>Fernsprechgebührenordnung</i>, 20 December 1899, RGBL (1899), no. 51, pp. 711-14. • <i>Reichschuldenordnung</i>, 19 March 1900, RGBL (1900), no. 11, pp. 129-34. • <i>Gesetz, betreffend die Schlachtvieh- und Fleischbeschau</i>, 3 June 1900, RGBL (1900), no. 27, pp. 547-55. • <i>Gesetz, betreffend die deutsche Flotte</i>, 14 June 1900, RGBL (1900), no. 21, pp. 255-9. • <i>Gesetz, betreffend die Bekämpfung gemeingefährlicher Krankheiten</i>, 30 June 1900, RGBL (1900), no. 24, pp. 306-17. • <i>Gesetz, betreffend die Abänderung des Krankenversicherungsgesetzes</i>, 30 June 1900, RGBL (1900), no. 25, pp. 332f. • <i>Gesetz, betreffend die Abänderung der Unfallversicherungsgesetze</i>, 30 June 1900, RGBL (1900), no. 26, pp. 335-535. • <i>Gesetz, betreffend die Unfallfürsorge für Gefangene</i>, 30 June 1900, RGBL (1900), no. 26, pp. 536-45. |
| 1900-1914 | <ul style="list-style-type: none"> • <i>Gesetz, betreffend die deutsche Flotte</i>, 14 June 1900, RGBL (1900), no. 21, pp. 255-9. • <i>Gesetz, betreffend die Abänderung der Unfallversicherungsgesetze</i>, 30 June 1900, RGBL (1900), no. 26, pp. 335-535. • <i>Gesetz, betreffend die Unfallfürsorge für Gefangene</i>, 30 June 1900, RGBL (1900), no. 26, pp. 536-45. • <i>Gesetz über die privaten Versicherungsunternehmungen</i>, 12 May 1901, RGBL (1901), no. 18, pp. 139-73. • <i>Unfallfürsorgegesetz für Beamte und Personen des Soldatenstandes</i>, 18 June 1901, RGBL (1901), no. 26, pp. 211-16. • <i>Gesetz über das Verlagsrecht</i>, 19 June 1901, RGBL (1901), no. 27, pp. 217-26. • <i>Gesetz, betreffend das Urheberrecht an Werken der Literatur und der Tonkunst</i>, 19 June 1901, RGBL (1901), no. 27, pp. 227-39. • <i>Schaumweinsteuergesetz</i>, 9 May 1902, RGBL (1902), no. 24, pp. 155-63. • <i>Seemannsordnung</i>, 2 June 1902, RGBL (1902), no. 27, pp. 127-211. • <i>Zolltarifgesetz</i>, 25 December 1902, RGBL (1902), no. 52, pp. 303-441. • <i>Gesetz, betreffend Kinderarbeit in gewerblichen Betrieben</i>, 30 March 1903, RGBL (1903), no. 14, pp. 113-21. • <i>Gesetz, betreffend die Ordnung des Reichshaushalts und die Tilgung der Reichsschuld</i>, 3 June 1906, RGBL (1906), no. 31, pp. 620-74, in particular appendix 2 'Zigarettensteuergesetz', pp. 631-42 and appendix 4 'Erbschaftssteuergesetz', pp. 654-74. • <i>Gesetz, betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie</i>, 9 |

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| | <p>January 1907, RGBL. (1907), no. 3, pp. 7-18.</p> <ul style="list-style-type: none"> • <i>Beamtenhinterbliebenengesetz</i>, 17 May 1907, RGBL. (1907), no. 21, pp. 208-14. • <i>Militärhinterbliebenengesetz</i>, 17 May 1907, RGBL. (1907), no. 21, pp. 214-32. • <i>Scheckgesetz</i>, 11 March 1908, RGBL. (1908), no. 12, pp. 151-7. • <i>Gesetz über den Versicherungsvertrag</i>, 30 May 1908, RGBL. (1908), no. 30, pp. 263-305. • <i>Weingesetz</i>, 7 April 1909, RGBL. (1909), no. 20, pp. 393-402. • <i>Gesetz über den Verkehr mit Kraftfahrzeugen</i>, 3 May 1909, RGBL. (1909), no. 26, pp. 437-44. • <i>Gesetz gegen den unlauteren Wettbewerb</i>, 7 June 1909, RGBL. (1909), no. 31, pp. 499-506. • <i>Viehseuchengesetz</i>, 26 June 1909, RGBL. (1909), no. 34, pp. 519-42. • <i>Besoldungsgesetz</i>, 15 July 1909, RGBL. (1909), no. 38, pp. 573-660. • <i>Zündwarensteuergesetzes</i>, 15 July 1909, RGBL. (1909), no. 44, pp. 814-24. • <i>Gesetz über die Haftung des Reichs für seine Beamten</i>, 22 May 1910, RGBL. (1910), no. 29, pp. 798-800. • <i>Stellenvermittlergesetz</i>, 2 June 1910, RGBL. (1910), no. 34, pp. 860-65. • <i>Kolonialbeamtengesetz</i>, 8 June 1910, RGBL. (1910), no. 37, pp. 881-96. • <i>Reichsversicherungsordnung</i>, 19 July 1911, RGBL. (1911), no. 42, pp. 509-838. • <i>Hausarbeitsgesetz</i>, 20 December 1911, RGBL. (1911), no. 68, pp. 976-85. • <i>Versicherungsgesetz für Angestellte</i>, 20 December 1911, RGBL. (1911), no. 68, pp. 989-1061. • <i>Gesetz über den einmaligen außerordentlichen Wehrbeitrag</i>, 3 July 1913, RGBL. (1913), no. 41, pp. 524-43 • <i>Gesetz zur Besteuerung des Vermögenszuwachs</i>, 3 July 1913, RGBL. (1913), no. 41, pp. 505-21. • <i>Reichs- und Staatsangehörigkeitsgesetz</i>, 22 July 1913, RGBL. (1913), no. 46, pp. 583-93. |
| 1914-1918 (Wartime Laws, without Emergency Decrees of the Bundesrat) | <ul style="list-style-type: none"> • <i>Gesetz über die Ermächtigung des Bundesrats zu wirtschaftlichen Maßnahmen und über die Verlängerung der Fristen des Wechsel- und Scheckrechts im Falle kriegerischer Ereignisse</i>, 4 August 1914, RGBL. (1914), no. 53, §, 3, p. 327. • <i>Gesetz über den vaterländischen Hilfsdienst</i>, 5 December 1916, RGBL. (1916), no. 276, pp. 1333-9. • <i>Gesetz über die Besteuerung des Personen- und Güterverkehrs</i>, 8 April 1917, RGBL. (1917), no. 73, pp. 329-39. • <i>Gesetz über eine außerordentliche Kriegsabgabe für das Rechnungsjahr 1918</i>, 26 July 1918, RGBL. (1918), no. 101, 964-74. • <i>Biersteuergesetz</i>, 26 July 1918, RGBL. (1918), no. 98, pp. 863-85. • <i>Weinsteuergesetz</i>, 26 July 1918, RGBL. (1918), no. 97, pp. 831-46. • <i>Gesetz, betreffend die Besteuerung von Mineralwässern und künstlich bereiteten Getränken sowie die Erhöhung der Zölle für Kaffee und Tee</i>, 26 July 1918, RGBL. (1918), no. 97, pp. 849-61. • <i>Gesetz zur Abänderung der Reichsverfassung</i>, 28 October 1918, RGBL. (1918), no. 144, pp. 1274f. |

Based on: BGBl. NDB, 1867-70; RGBL. 1871-1914; and Kersten Rosenau's study *Hegemonie und Dualismus. Preußens staatsrechtliche Stellung im Deutschen Reich*, Verfassungsgeschichte der Neuzeit. Studien zur Deutschen Verfassungsgeschichte (Regensburg: Roderer, 1986), pp. 70-6; *Bundesgesetzblatt*, 1867-70; *Reichsgesetzblatt*, 1871-1914.

Table 3: Evolution of the National Ministerial Bureaucracy, 1867-1918

| Founding Date | Federal Department | Way of Formation | Legal Act Creating the Department | Competences | Further Development |
|---------------|---|---|--|---|--|
| 1867 | <i>Bundeskanzleramt</i> [Department of the Federal Chancellor] | Newly established | <i>Allerhöchster Präsidial-Erlaß, betreffend die Errichtung des Bundeskanzler-Amtes</i> , 12 August 1867, BGBl. NDB (1867), no. 3, p. 29. | All matters of national administration | Renamed <i>Reichskanzleramt</i> in 1871 |
| 1870 | <i>Auswärtiges Amt</i> [Federal Department of Foreign Affairs] | Integration of the Prussian Foreign Ministry into the federal budget and thus transformation into an independent federal agency | <i>Gesetz, betreffend die Feststellung des Haushalts-Etats des Norddeutschen Bundes für das Jahr 1870</i> , 13 June 1869, BGBl. NDB (1869), no. 23, pp. 211-227, appendix, chapter 4, 'Ministerium der auswärtigen Angelegenheiten'. See also <i>Protokolle (NDB)</i> , 1869, session 2, 22 February, § 21, p. 2; the official motion in <i>Drucksachen (NDB)</i> , 1869, no. 18; and Bismarck's decree to the Prussian diplomatic missions abroad, 10 January 1870, printed in Huber, <i>Dokumente</i> , vol. 2, no. 193. | Foreign affairs | --- |
| 1871 | <i>Reichskanzleramt</i> [Federal Department of the Reich Chancellor] | Renaming of the <i>Bundeskanzleramt</i> | <i>Allerhöchster Erlaß, betreffend die Abänderung der bisherigen Bezeichnung "Bundeskanzler-Amt" in "Reichskanzler-Amt"</i> , 12 May 1871, RGBL. (1871), no. 21, p. 102. | All matters of national administration that were not explicitly conferred upon any other federal department | Postal and telegraphic competences transferred to the newly found <i>Amt des Generalpostmeisters</i> in 1880; competences over Alsace-Lorraine transferred to the newly found <i>Reichskanzleramt für Elsaß-Lothringen</i> in 1876; judicial competences transferred to the newly found <i>Reichsjustizamt</i> in 1877; fiscal |

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| | | | | | competences transferred to the newly found <i>Reichsschatzamt</i> in 1879; renamed <i>Reichsamt des Innern</i> in 1879 |
| 1872 | <i>Kaiserliche Admiralität</i> [Imperial Admiralty] | Renaming of the Prussian Navy Department | <i>Allerhöchster Erlaß, betreffend die oberste Marinebehörde</i> , 1 January 1872, RGBl. (1872), no. 2, p. 5. | Command and administration of the navy | Split into the High Command [<i>Oberkommando</i>] and the <i>Reichsmarineamt</i> in 1889 |
| 1873 | <i>Reichseisenbahnamt</i> [Federal Department for Railway Affairs] | Newly established | <i>Gesetz, betreffend die Errichtung eines Reichs-Eisenbahn-Amtes</i> , 27 June 1873, RGBl. (1873), no. 18, pp. 164f. | Supervision of railway affairs (the construction and operation of railways were responsibilities of the states) | --- |
| 1876 | <i>Amt des General-Postmeisters</i> [Federal Agency of the Postmaster General] | Transformation of the directorates for postal and telegraphic affairs in the <i>Reichskanzleramt</i> into an independent federal department | <i>Verordnung, betreffend die Verwaltung des Post- und Telegraphenwesens</i> , 22 December 1875, RGBl. (1875), no. 34, p. 379. | Administration of postal and telegraphic affairs | Transformed into the <i>Reichspostamt</i> in 1880 |
| 1876 | <i>Reichskanzleramt für Elsaß-Lothringen</i> [Federal Department for Alsace-Lorraine] | Transformation of the directorate for the administration of Alsace-Lorraine in the <i>Reichskanzleramt</i> into an independent federal department | | Administration of Alsace-Lorraine | Transformed into the <i>Ministerium für Elsaß-Lothringen</i> in 1879 |
| 1877 | <i>Reichsjustizamt</i> [Federal Department of Justice] | Transformation of the directorates for judicial affairs in the <i>Reichskanzleramt</i> into an independent federal department in the context of budgetary negotiations with the <i>Reichstag</i> | <i>Gesetz, betreffend die Feststellung des Haushalts-Etats des Deutschen Reichs für das Vierteljahr vom 1. Januar bis 31. März 1877</i> , 23 December 1876, RGBl. (1876), no. 28, pp. 239-74. See section 'Ausgaben', chapter 8a. | Administration of federal judicial affairs: preparation and implementation of the federal judiciary laws and all other laws concerning the administration of justice; preparation of expert opinion reports on legislative proposals; supervision of the implementation of the federal judiciary laws by the states | --- |
| 1879 | <i>Reichsamt für die Verwaltung der Reichseisenbahnen</i> [Federal Department for the Administration of National Railways] | Merging and transformation of different subdivisions of the <i>Reichskanzleramt</i> into an independent federal department | <i>Allerhöchster Erlaß, betreffend die Errichtung des Reichsamts für die Verwaltung der Reichseisenbahnen</i> , 27 May 1878, RGBl. (1879), no. 24, p. | Construction and operation of the railways that the Reich owned in Alsace-Lorraine and Luxembourg | --- |

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| 1879 | <i>Reichsschatzamt</i> [Federal Treasury] | Transformation of the directorate for fiscal affairs in the <i>Reichskanzleramt</i> into an independent federal department | <i>Allerhöchster Erlaß, betreffend die Errichtung des Reichsschatzamts</i> , 14 July 1878, RGBl. (1879), no. 25, p. 196. | Administration of the financial affairs and assets of the Reich, in particular concerning matters of national customs and duties, federal taxes, and currency | --- |
| 1879 | <i>Reichsamt des Innern</i> [Federal Department of the Interior] | Renaming of the <i>Reichskanzleramt</i> | <i>Allerhöchster Erlaß, betreffend die Benennung des Reichskanzler-Amtes und den Titel des Vorstandes dieser Behörde</i> , 24 December 1879, RGBl. (1879), no. 37, p. 321. | All matters of national administration that were not explicitly conferred upon any other federal department | --- |
| 1879 | <i>Ministerium für Elsaß-Lothringen</i> [Ministry for Alsace-Lorraine] | Created by the constitutional reform of the <i>Reichsland</i> in 1879, which merged the responsibilities of the <i>Reichskanzleramt für Elsaß-Lothringen</i> with those of the office of the <i>Oberpräsident</i> in Straßbourg | <i>Gesetz, betreffend die Verfassung und die Verwaltung Elsaß-Lothringens</i> , 4 July 1879, RGBl. (1879), no. 22, pp. 165-9. | Administration of Alsace-Lorraine | --- |
| 1880 | <i>Reichspostamt</i> [Federal Department for Postal Affairs] | Reorganisation and renaming of the <i>Amt des General-Postmeisters</i> | <i>Allerhöchster Erlaß, betreffend die Benennung der obersten Reichsbehörde für die dem Ressort des General-Postmeisters zugewiesenen Verwaltungszweige</i> , 23 Februar 1880, RGBl. (1880), no. 5, p. 25. | Administration of postal and telegraphic affairs | --- |
| 1889 | <i>Reichsmarineamt</i> [Federal Department of the Navy] | Emerged from the <i>Kaiserliche Admiralität</i> by separating the command from administration of the navy (the command was conferred upon the High Command [<i>Oberkommando</i>]) | <i>Allerhöchster Erlaß, betreffend die Trennung des Oberkommandos der Marine von der Verwaltung derselben</i> , 30 March 1889, RGBl. (1889), no. 7, p. 47. | Administration of naval affairs | --- |
| 1907 | <i>Reichskolonialamt</i> [Federal Department for Colonial Affairs] | Transformation of the colonial department of the <i>Auswärtige Amt</i> into an independent | <i>Allerhöchster Erlaß, betreffend die Errichtung des Reichs-Kolonialamts</i> , 17 May 1907, RGBl. | Administration of the German colonies | --- |

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| | | federal department | (1907), no. 22, p. 239. | | |
| 1916 | <i>Kriegsernährungsamt</i> [Wartime Agency of Food Supply] | Newly established | <i>Bekanntmachung über die Errichtung eines Kriegsernährungsamts</i> , 22 May 1916, RGBL. (1916), no. 102, pp. 402f. | Organisation of the wartime food supply | Transformed into the <i>Reichsernährungsamt</i> in 1918 |
| 1917 | <i>Reichswirtschaftsamt</i> [Federal Department of Economics] | Newly established | <i>Allerhöchster Erlaß über die Errichtung des Reichswirtschaftsamts</i> , 21 October 1917, RGBL. (1917), no. 188, p. 963. | Administration of the economic and social affairs of the Reich | Socio-political competences transferred to the newly-established <i>Reichsarbeitsamt</i> in 1918 |
| 1918 | <i>Reichsarbeitsamt</i> [Federal Department of Labour] | Transformation of the directorates for socio-political affairs from the <i>Reichswirtschaftsamt</i> into an independent federal department | <i>Allerhöchster Erlaß über die Errichtung des Reichsarbeitsamts</i> , 4 October 1918, RGBL. (1918), no. 136, p. 1231. | Labour management and administration of social affairs | --- |
| 1918 | <i>Reichsernährungsamt</i> [Federal Department of Food Supply] | Renaming of the <i>Kriegsernährungsamt</i> | <i>Namensänderung des Kriegsernährungsamts</i> , 19 November 1918, RGBL. (1918), no. 158, p. 1319. | Organisation of the wartime food supply | --- |

Based on: BGBL. NDB, 1867-1870; RGBL., 1871-1918; Huber, *Verfassungsgeschichte*, vol. 3, pp. 833-46; and Rudolf Morsey's two studies *Die oberste Reichsverwaltung unter Bismarck 1867-1890* (Münster: Aschendorff, 1957) and "Zur Geschichte der obersten Reichsverwaltung im Wilhelminischen Deutschland (1890-1900)," *Deutsches Verwaltungsblatt* 24, no. 86 (1971): 8-16.

CHAPTER IV PARTICIPATION



Picture 3: *Bundesrat* assembly hall in the *Reichstag* building

Berlin, 27 February 1905. On days like this, Franz Bumm, a Bavarian-born official in the Federal Department of the Interior, could not believe his eyes. One of his duties was to keep the minutes of the *Bundesrat* meetings. The agenda of this day included decisions about the customs tariff law and the supplementary budget, two very important matters. But when he walked into the wood-panelled hall where the state governments usually met around a large U-shaped table, it was half empty. Of the twenty-five governments only seven had sent at least one of their officials to the meeting. All the other governments had either simply failed to show up – Waldeck-Pyrmont and Hamburg – or were represented by the

plenipotentiary of another state. Most popular was the financial expert Arnold Paulssen from the Grand Duchy Saxe-Weimar-Eisenach. He acted on behalf of no fewer than twelve governments that had fifteen votes in total, only two short of Prussia. When Bumm turned to the Prussian bench, he saw another odd constellation. There were five plenipotentiaries, but none of them came from the Prussian government. Rather, all of them held an office in one of the federal departments, the *Reichsämtler*.¹

It was with such strange patterns of attendance in mind that the Baden prime minister Julius Jolly complained as early as 1872 that ‘the activity of the *Bundesrat* is a farce in which it is not worth participating’.² The southern German statesman had a point. The plenary assembly of the *Bundesrat* could not function as a forum for negotiations, because the plenipotentiaries were bound by the instructions of their home governments. Everyday consultations between the monarchical governments usually took place via their diplomatic missions rather than in the council. Protracted exchanges of arguments were felt to be out of place in the plenary assembly. When a newly-appointed Hanseatic plenipotentiary, unaware of this unspoken rule, started a lengthy speech, his Bavarian colleague Hugo Graf von und zu Lerchenfeld-Köfering reproached him by snoring briefly, but loudly.³ Nor could the *Bundesrat* be described as an independent deliberative organ. It had no secretaries, books, or files of its own, but relied in all these matters on the support of the Federal Department of the Interior.⁴ The state governments did not even convene in a palace put aside for this purpose, but used either one of the halls in the Federal Department of the Interior or – very rarely – a

¹ *Protokolle (DR)*, 1905, session 11, 27 February, pp. 65f. For biographical information on Paulsen, see Lilla, *Föderalismus*, pp. 470f.

² [‘im übrigen ist die Tätigkeit des Bundesrates eine Farce, an der sich zu beteiligen die Mühe nicht lohnt’] Quoted in Walther Peter Fuchs, “Bundesstaaten und Reich: Der Bundesrat,” in *Zur Problematik “Preußen und das Reich,”* ed. Oswald Hauser, *Neue Forschungen zur brandenburg-preussischen Geschichte* 4 (Cologne: Böhlau, 1984), p. 93 and Rauh, *Föderalismus*, p. 91.

³ Rauh, *Föderalismus*, p. 111.

⁴ See for example the note in *Handbuch*, 1884, p. 12.

suite of ponderously furnished rooms that was reserved for them in the new *Reichstag* building (see Picture 3).⁵

It is mistaken, however, to see the *Bundesrat* as a dusty band of representative-automata that did nothing but cast votes as ordered by their governments. Such views are based on a misunderstanding of how the *Bundesrat* worked and what it did. The plenary assembly was indeed no forum of consultation. But the real work took place in the committees. Here, the plenipotentiaries of the state governments negotiated and revised bills. According to the constitution, there were eight committees in total, which were responsible for the army and fortresses, naval affairs, customs and taxes, commerce and transportation, railway, postal and telegraphy affairs, the judicial system, accounting, and foreign affairs.⁶ Soon after unification, four additional committees were established. These dealt with questions concerning Alsace-Lorraine, the constitution, the by-laws, and the fare system of rail cargo.⁷

Each committee consisted of the representatives of at least four state governments. In most committees, this number increased to seven after 1890. The seats in the committees were allocated to the states on the basis of annual elections by the plenary assembly. There were three exceptions. As part of her special rights, Bavaria had a permanent seat in the committee for the army and fortresses. She also enjoyed the privilege of a permanent seat in the committee for foreign affairs, as did Württemberg and Saxony. The members of the naval committee, finally, were nominated by the Emperor.⁸

Those state governments that were elected into a committee appointed the members from the ranks of their *Bundesrat* plenipotentiaries.⁹ In the committees, each state had one vote.¹⁰ Unlike in the plenary assembly, where the number of votes greatly differed among the states,

⁵ Rauh, *Föderalismus*, p. 110f.

⁶ RV (1871), art. 8.

⁷ On the committees, see Lilla, *Föderalismus*, p. 11. The committees for foreign affairs and for the fare system of rail cargo only existed on paper.

⁸ For these regulations, see RV (1871), art. 8.

⁹ *Geschäftsordnung* (1871), § 17. *Geschäftsordnung* (1880), § 18.

¹⁰ *Geschäftsordnung* (1871), § 17. *Geschäftsordnung* (1880), § 19.

decision-making in the committees was therefore egalitarian. At least in theory, this arrangement gave the states – in particular the middling states, which usually held most seats in the committees – the chance to advocate their interests on an equal footing with the federal hegemon Prussia.

The work of the committees and the voting process in the plenary assembly were closely intertwined. Legislative proposals – usually prepared by one of the federal departments – were first introduced into the plenary assembly, which referred them to the relevant committee for negotiation and revision. After the committee had discussed the bill, its speaker or *Referent* – a position that, depending on the subject, traditionally belonged to a specific state, such as to Bavaria for fiscal issues and to Saxony for constitutional questions – presented the suggestions of the committee to the states in the plenary assembly, either orally or in writing.¹¹ The plenipotentiaries of the states could then propose amendments before the assembly took a vote on the bill. If adopted, the proposal was referred to the *Reichstag*. The parliament could either adopt the bill without changes or demand revisions, in which case it came back to the *Bundesrat*. The plenary assembly could then either vote on the bill directly or reintroduce it into the relevant committee before referring it back to the *Reichstag* for final adoption or rejection.¹²

This procedure made the *Bundesrat* one of the main engines of federal government. In April 1871, Bismarck characterised the council of states as ‘a kind of Palladium for our future, a great guarantee for the future of Germany’.¹³ This was true in the sense that – as we have seen in Chapter 2 – within the broader structure of the constitution the position of the *Bundesrat* guaranteed Prussia’s hegemony and prevented the introduction of parliamentary government. The fact that the proceedings of the *Bundesrat* did not stand in the centre of

¹¹ *Geschäftsordnung* (1871), § 18. *Geschäftsordnung* (1880), § 19. On the position of the speakers, see Lilla, *Föederalismus*, pp. 11, 15.

¹² On the complex course of procedure in the *Bundesrat* that is described in this paragraph, see especially *Geschäftsordnung* (1871), art. 12 and *Geschäftsordnung* (1880), art. 15 and 16.

¹³ [‘ein Palladium für unsere Zukunft, eine große Garantie für die Zukunft Deutschlands’] Quoted in Fuchs, “Bundesstaaten und Reich: Der Bundesrat”, p. 89 and in Rauh, *Föederalismus*, p. 91.

public interest and were not in the least exciting did not change anything about its important role in federal government. As the contemporary constitutional lawyer Heinrich Triepel put it, the *Bundesrat* resembled a ‘good housewife’ that kept the house running, ‘because, as we know, that wife is the best that you talk about the least’.¹⁴

Due to the central constitutional position of the *Bundesrat* and its complex internal procedures, it was a matter of great importance whom the state governments chose to represent them in the council. The plenipotentiaries they nominated did more than just raise their hands in the plenary assembly. They were also responsible for negotiating bills in the committees and for reporting back to their home governments in order to enable them to make an informed decision on how to vote.

The composition of the ranks of the plenipotentiaries is therefore a measure for what parts of the complex constitutional system came to wield influence in and over the *Bundesrat*. If all the states had attended in the person of officials from their own government, they could have negotiated and voted relatively independently. The *Bundesrat* would have been a proper representation of the states, which would have advocated their genuine interests vis-à-vis the federal government. While the middling states could have used their position in the committees to create a counterweight to Prussia, the Prussian State Ministry could have used its numerical superiority in the plenary assembly to push its own agenda.

If, in contrast, federal officials had infiltrated the Prussian delegation, this would mean that the national government could have used the *Bundesrat* as a platform for its own interests. Both in the plenary assembly and in the committees, federal officials could have used the great resources and expertise of the *Reichsämtler* to overwhelm the other state governments. If the latter had succumbed to the dominance of the Prussian bench and had refrained from sending officials of their own ministries to the meetings, the *Bundesrat* would have lost its

¹⁴ [‘gute Hausfrau’], [‘denn bekanntlich sei die Frau die beste, von der man am wenigsten spreche’] Heinrich Triepel, *Unitarismus und Föderalismus im Deutschen Reiche. Eine staatsrechtliche und politische Studie* (Tübingen: Mohr, 1907), p. 85.

function as a representation of the states and would have become a satellite organ of the federal government.

We know from the previous chapter that this is precisely what happened. The national government around the Chancellor and the state secretaries gradually established control over the council and used it for its own purposes. An examination of the patterns of representation in the *Bundesrat* can show us how exactly this happened. In other words: it can expose the mechanisms by which the federal government turned the *Bundesrat* into an obedient sanctioning machine.

How, then, did the participation of the states in the *Bundesrat* evolve over the years? And how was it linked to the development of the council's role in federal government? Historians have not paid much attention to these questions, because they have often failed to understand the pivotal role of the *Bundesrat* in the decision-making process of the union. There are a few doctoral studies from the 1960s that have examined the *Bundesrat* delegations of individual states, most importantly of Baden and the Hanseatic city-states.¹⁵ The participation of the four middling states has been relatively well researched by works that have looked at broader questions about Germany's federal nature. These studies have demonstrated that while Baden was one of the most loyal supporters of the Prussian bench, the Bavarian and Württemberg government pursued more or less independent policies for most of the time.¹⁶ Just recently, the first comprehensive collection of short biographies of the *Bundesrat* plenipotentiaries has been published.¹⁷ However, none of these studies has provided quantitative evidence for how the states were represented in the *Bundesrat*. It is unknown how patterns of attendance

¹⁵ Hans Klaus Reichert, *Baden am Bundesrat 1871 bis 1890* (Heidelberg: Berenz, 1966). Helmut Paul Dahl, *Lübeck im Bundesrat 1871-1914. Möglichkeiten und Grenzen einzelstaatlicher Politik im Deutschen Reich* (Lübeck: Schmidt-Römhild, 1969). Hans-Georg Schönhoff, *Hamburg im Bundesrat. Die Mitwirkung Hamburgs an der Bildung des Reichswillens 1867-1890* (Hamburg: Christians, 1967).

¹⁶ On Bavaria, see Binder, *Reich* and Rauh's two studies *Föderalismus* and *Parlamentarisierung*. On Württemberg, see Binder's book and Georg Helmut Kleine, *Der württembergische Ministerpräsident Freiherr von Mittnacht*, Veröffentlichungen der Kommission für geschichtliche Landeskunde in Baden-Württemberg 50 (Stuttgart: Kohlhammer, 1961). On Baden, see Reichert, *Baden am Bundesrat 1871 bis 1890*. On the participation of the middling states more generally, see also Fuchs, "Bundesstaaten und Reich: Der Bundesrat".

¹⁷ Lilla, *Föderalismus*.

evolved in terms of who represented which state in what function, for what purpose, and to what effect.

In light of the special relationship between the Prussian and federal government, we should concentrate on the plenipotentiaries of Prussia and the twenty small states. There are structural reasons for proceeding in this way. For a majority in the *Bundesrat*, thirty votes were required. As the Prussian bench possessed seventeen votes on its own, it needed the support of at least thirteen other votes in order to adopt legislative proposals, ordinances, and other decisions.¹⁸ Since the middling states put great emphasis on pursuing independent policies, these thirteen votes usually came from the group of small states, which had twenty-four votes in total. As the small principalities were financially, economically, and militarily dependent on the Prussian and federal government, most of them were – as we will see in the course of this chapter – loyal followers of the Prussian bench.

The only way to measure the attendance of the states in the *Bundesrat* is to undertake a statistical analysis of its protocols. These were collected in annual volumes, which were distributed to the twenty-five state governments only. The protocols do not record debates, but merely list technical matters, such as agenda points and voting results. Each of them starts with a list of attendance that shows by which plenipotentiaries the states were represented in the meeting of the plenary assembly and which offices most of these envoys held in the states or the Reich.¹⁹ For each meeting, we can thus categorise the plenipotentiaries according to their function. If we add the numbers of all meetings that took place in any given year and sort the resulting aggregates chronologically, we can determine how patterns of attendance evolved over the whole period between 1871 and 1918.

The main challenge of such a statistical analysis is the large volume of data. Between 1871 and 1913, the *Bundesrat* usually met between forty and fifty times per year. During the war,

¹⁸ See RV (1871), art. 6.

¹⁹ *Protokolle (DR)*, 1871-1918. *Geschäftsordnung* (1871), §14.

this figure doubled (see Figure 2). The number of plenipotentiaries also skyrocketed over time, in particular on the Prussian bench. In 1876, Prussia was represented by 161 plenipotentiaries in total. Thirty-eight years later, their number had swollen to 729 (see Figure 3).

Moreover, the statistical analysis has to take two further official records into account, namely the protocols of the Prussian State Ministry and the annual handbook of the federal constitutional organs and administrative agencies.²⁰ The protocols contain lists of the members of the Prussian cabinet that make it possible to determine which *Bundesrat* plenipotentiaries were part of the Prussian government. In the handbook, we find the annual registry of the *Bundesrat*. This list shows which officials the state governments registered as regular and proxy plenipotentiaries. With reference to the handbook, we can thus determine what registration status the participants in the *Bundesrat* meetings had and how membership (who was registered as a plenipotentiary?) compared to attendance (who actually showed up?).²¹

On the basis of this approach, this chapter will undertake the first reliable analysis of how the participation of the state governments in the *Bundesrat* evolved from the unification to the wartime collapse of the monarchy. It will first expose the tools by which the federal government around the Chancellor gained control over the *Bundesrat*: the proxy plenipotentiaries of Prussia and a complex system of substitutions among the small states. While the former enabled the federal administration to sneak its executives into the *Bundesrat* through the back door and to take control over the Prussian delegation, the latter guaranteed that most of the small states usually voted with the Prussian bench. After that, this chapter

²⁰ *Protokolle (PSM)*, vol. 6/II-11/I, 1867-1918. *Handbuch*, 1874-1918.

²¹ The registry was published in the *Handbuch* from 1874 onwards. For the first three years after unification, registration lists can be found in the protocols of the *Bundesrat*. See *Protokolle (DR)*, 1871, session 1, 20 February, § 2, pp. 2-4; 1872, session 7, 13 March, § 63, pp. 38-40; and 1873, session 3, 17 February, § 33, pp. 18-21.

will examine what role these tools of federalisation played in the different periods of federal government.

Over the course of this analysis, it will become clear that Prussia became completely mediatised through the years and that the small states never managed to participate in the decision-making of the plenary assembly independently. As a result, the *Bundesrat* became a compliant instrument of the federal administration. By the end of this process, it had turned from a political organ of the monarchical governments into a purely administrative body of bureaucratic specialists. As such, it could no longer prevent the parliamentarisation of federal government.

Tools of Federalisation

According to the constitution, each state government could appoint as many plenipotentiaries in the *Bundesrat* as it had votes. All states that had more than one vote could cast their votes in their entirety only. It was not allowed to split them.²² This rule implied that it was irrelevant how many plenipotentiaries a state sent to a meeting. The actual voting was the responsibility of the so-called ‘directing plenipotentiary’, the ‘stimmführender Bevollmächtigter’. As long as he was present, the state could cast its vote. In case of his absence, any other plenipotentiary could substitute for him.²³ A state was therefore able to participate in the voting process as long as it was represented by at least one plenipotentiary.

The plenipotentiaries were told by their home governments how to vote on legislative proposals.²⁴ In Prussia, the instruction of the *Bundesrat* delegation was the right of the foreign minister. For this reason, each chancellor held this office in the Prussian State Ministry at all times. Without control over the Prussian *Bundesrat* vote, the Chancellor could not hope to

²² RV (1871), art. 6.

²³ *Geschäftsordnung* (1871), § 2.

²⁴ On the instruction of the plenipotentiaries, see Huber, *Verfassungsgeschichte*, vol. 3, pp. 856f.

push projects through the *Bundesrat*. In Bismarck's words: 'The relevance of the Reich Chancellor is based on his position as Prussian minister of foreign affairs'.²⁵ For the daily operation of federal government, this personal union was more important than that of the Chancellor and the Prussian prime minister, which – as we have seen in the previous chapter – was suspended twice before the turn of the century.²⁶

But in order to make the machinery of federal government work, it was not enough to give the Chancellor control over the Prussian *Bundesrat* vote. The problem was that the number of constitutionally determined plenipotentiaries on the Prussian bench was simply too small. Seventeen plenipotentiaries could not provide the administrative expertise that was needed to introduce legislative proposals from all fields of government, to negotiate them in the committees, and to defend them in the plenary assembly. As one remedy for this problem, the by-laws granted the plenipotentiaries the right to engage expert clerks – the so-called *Kommissare* – to assist them in the various committees.²⁷ But this measure alone did not solve the problem. In order to lend more weight to its views, the Prussian-federal executive needed more representatives with managing authority in the various branches of administration. Already in the very first meeting after the unification, it was necessary that three high-ranking executives from the Prussian ministries of war, justice, and the interior attended the *Bundesrat*, even though they were not registered as regular plenipotentiaries.²⁸

The main reason why an expansion of the Prussian bench was necessary, however, was the lack of constitutionally defined rights of the federal administration. Assuming the position of a plenipotentiary was the only way for federal executives to enter the *Bundesrat* in order to

²⁵ ['Die Bedeutung des Reichskanzlers beruht auf seiner Stellung als preußischer Minister des Auswärtigen.'] Quoted in Kersten Rosenau, *Hegemonie und Dualismus. Preußens staatsrechtliche Stellung im Deutschen Reich*, Verfassungsgeschichte der Neuzeit. Studien zur Deutschen Verfassungsgeschichte (Regensburg: Roderer, 1986), p. 27.

²⁶ On the importance of the personal union between the Chancellor and the Prussian foreign minister, see for example Georg Meyer, *Lehrbuch des Deutschen Staatsrechts*, ed. Gerhard Anschütz, 7th ed. (Leipzig & Munich: Duncker & Humblot, 1919), pp. 524-6.

²⁷ *Geschäftsordnung* (1871), § 18. On the commissioners, see Fuchs, "Bundesstaaten und Reich: Der Bundesrat", p. 95.

²⁸ *Protokolle (DR)*, 1871, session 1, 20 February, pp. 1-12.

defend legislative proposals that had been prepared in one of the *Reichsämtler*. The constitution did not establish any direct means – as the previous chapter has shown – by which the federal administration around the Chancellor could introduce bills into the legislative process. In light of the close structural connection between the Prussian and federal executive, the most pragmatic solution to this problem was to make federal officials part of the Prussian *Bundesrat* delegation.

With federal executives reinforcing the ranks of their Prussian colleagues, it was necessary that Prussia could appoint more than seventeen plenipotentiaries. It thus became practice that in addition to their regular plenipotentiaries the states could appoint proxy plenipotentiaries. Already in 1872, an amendment of the *Bundesrat* by-laws made them an official institution.²⁹ Whereas the number of regular plenipotentiaries was limited to the number of votes that a state had in the *Bundesrat*, the number of proxies was not.

In the first few years after unification, each proxy substituted a specific regular plenipotentiary in one of the committees and was therefore allowed to participate only in those meetings of the plenary assembly that concerned matters of the relevant committee.³⁰ This limitation became gradually irrelevant. When Bismarck started his attempt to reorganise federal government in 1880, the states adopted several amendments to the by-laws that – among other things – equipped the proxies with a universal status. From now on, they were general members of the *Bundesrat* that could participate in any meeting of the plenary assembly and the committees.³¹

Both regular and proxy plenipotentiaries were registered at the beginning of each parliamentary year at the office of the *Bundesrat*, which was at first part of the *Kanzleramt* and then – after the *Kanzleramt* had been renamed in 1879 – of the Federal Department of the

²⁹ *Protokolle (DR)*, 1872, session 9, 25 March, § 87, pp. 51f.

³⁰ *Geschäftsordnung* (1871), § 17 in conjunction with *Protokolle (DR)*, 1872, session 9, 25 March, §§ 87.3, 87.5, p. 52.

³¹ *Geschäftsordnung* (1880), § 1. On the gradual development of the status of the proxies, see also Rauh, *Föderalismus*, p. 103.

Interior. This registry was published in the handbook. But the state governments could also appoint regular and proxy plenipotentiaries ad hoc, for example in case one of their plenipotentiaries died or they needed an additional expert on a certain matter. Such spontaneous registrations were recorded in the *Bundesrat* protocols.

The Prussian government usually registered between fifteen and seventeen regular plenipotentiaries, thus making use of the maximum amount of registrations that the constitution allowed (see Figure 4). The development of the proxy plenipotentiaries that were on record for Prussia in the registry was much more dynamic. Their number rose steadily from two in 1873 to a level of forty in the first years of the war, before skyrocketing to seventy-one in 1918 (see Figure 4). The great increase of the overall number of Prussian plenipotentiaries– from fifteen in 1871 to eighty-seven in 1918 – was therefore due to the rise of the proxies. Between 1888 and 1890 the registry comprised roughly as many proxy as regular plenipotentiaries for Prussia. In 1891, the former outnumbered the latter for the first time. The gap gradually widened until the turn of the century, when the share of proxy plenipotentiaries reached sixty per cent (see Figure 5). Until the last year of the war, the ratio between registered proxy and regular plenipotentiaries stayed at a level of two to one.

This development towards a dominance of the proxies was even more pronounced in constitutional practice. Figure 6 shows how many Prussian proxy and regular plenipotentiaries appeared in the *Bundesrat* each year between 1871 and 1918. In the first thirteen years after unification, attendance fluctuated greatly. But the regular plenipotentiaries always outnumbered the proxies by at least one hundred appearances. After 1884, there was a clear trend: the attendance of the proxies rose steadily while that of the regular plenipotentiaries decreased. Between 1885 and 1894, they balanced each other for most of the time. After that, the trends diverged more sharply. In 1900, three hundred proxies sat on the Prussian bench, as compared to only seventy-eight regular plenipotentiaries. Until the beginning of the war, the proxies constituted between eighty and sixty-five per cent of all

attendants, while the share of regular plenipotentiaries never exceeded twenty-eight per cent (see Figure 7). In 1914, the number of both regular and proxy plenipotentiaries more than doubled. By the time the war ended, it had dropped back to the pre-war level.

In addition to the regular and proxy plenipotentiaries, Prussia sometimes sent officials to the *Bundesrat* who were registered neither in the annual registry nor in the protocols. These unregistered plenipotentiaries were usually administrative experts on a subject that was addressed in a few meetings only. Their attendance was therefore very rare. Between 1871 and 1913, their number fluctuated between zero and fifty-three (see Figure 6). In the first three years of the war, it rose so much that they appeared in the plenary assembly more often than the regular plenipotentiaries. But this wartime growth was due to a purely technical reason. From 1915 to 1917, there were no new annual registries. Any plenipotentiary who made his debut in the *Bundesrat* after 1914 was thus unregistered, unless the state governments undertook an ad-hoc registration in one of the meetings. They usually did not do so because the war removed such formalities from the top of their agenda.

In general, the unregistered plenipotentiaries were so few that they mattered little for the evolution of the Prussian *Bundesrat* delegation. The massive increase in the total number of attendants was due to one factor only: the rise of the proxies. This implies that in order to determine by whom the Prussian bench was controlled we have to examine who the proxies actually were. Did they come from the Prussian or federal administration?

The following statistics classify all officials of the *Reichsämtter* and other national agencies as federal office holders, regardless of their specific rank. In the same manner, all members of the Prussian administration are categorised as Prussian office holders. Those plenipotentiaries that held positions in both Prussian and federal institutions – such as most prominently the Chancellor and Prussian foreign minister – are considered hybrids. For members of the Prussian ministry of war, there is a separate category. As the Prussian ministry administered

the military affairs of all states of the union, there is no point in asking whether its officials represented exclusively Prussian or federal interests.

In the registry, the professional background of the Prussian proxies evolved according to a clear trend (see Figure 8). The groups of Prussian and federal executives both grew between 1871 and 1918, but at very different rates. While the number of Prussian officials rose from two in the early 1870s to twelve in 1914, that of federal office holders increased from zero to over twenty-five. Only in the first seven years after the unification did the registered proxies not include any federal executives. In the first year that they made the list of proxies, they immediately outnumbered their Prussian colleagues. After 1879, more than fifty per cent of all registered proxies came from the federal administration each year (see Figure 9). Their share gradually increased to seventy-four per cent in 1901 and then stayed at a level between sixty and seventy per cent until the end of the war. At the same time, the share of Prussian officials settled at around ten per cent. Executives that held both federal and Prussian offices hardly played any role among the registered proxies. For most of the time, there was not a single such representative. Only in the 1880s and early 1890s did the registry include one or two. The number of military officials, too, was always very low among the proxies. During Bismarck's chancellorship, the registry comprised no more than two in any year. While this number doubled in the Wilhelmine era, it never exceeded this level, not even during the war.

In the registry, then, federal executives were by far the largest group among the proxies. This implies that the Prussian bench became dominated by the federal administration over the years, because the proxies – as Figure 7 has shown – constituted an ever-growing share of all Prussian plenipotentiaries that attended the *Bundesrat*. Indeed, the federal executives became an overwhelmingly dominant presence on the Prussian bench (see Figure 10). After unification, it took them no longer than one year to outnumber their Prussian colleagues. While Prussian officials regained the upper hand in 1874, the trend favoured the federal executives for all years after 1876. Only in 1883 did Prussian and federal institutions provide

roughly the same number of attendants on the Prussian bench. After that, the number of federal executives rose steadily, while that of their Prussian counterparts dropped. The gap grew constantly. In 1907, merely forty-two Prussian officials faced no less than 430 representatives of the federal administration. While absolute numbers of attendance declined for both groups during the next few years, federal officials constituted an ever-growing share of all Prussian plenipotentiaries (see Figure 11). In 1910, they represented no less than ninety-three per cent. At the same time, the share of Prussian officials dropped to five per cent. This ratio meant in effect that the federal administration took over the Prussian bench completely.

When the war broke out in 1914, the attendance of both federal and Prussian executives climbed to an all-time high, namely to 553 and 142, respectively (see Figure 10). After this peak, the numbers gradually declined to their pre-war level. While the attendance of military officials increased during the war, it was still very low. There was not a single year between 1871 and 1918 where more than ten per cent of Prussian plenipotentiaries had a background in the army (see Figure 11). The attendance of executives that held both Prussian and federal offices was of similar insignificance, but less constant. Before 1890, up to forty-four hybrid officials appeared on the Prussian bench per year (see Figure 10). In the Wilhelmine era, there was never more than one. Even after the war broke out, the number of such officials rose to no more than four.

These patterns of attendance show that the evolution of the Prussian bench was shaped by one factor only: the gradual takeover by the federal government. As we have seen, this appropriation happened by means of a very complex mechanism. For the sake of clarity, it is worth briefly recapitulating the main features of this process. The overwhelming majority of federal officials entered the Prussian bench as proxy plenipotentiaries. It was easy for the federal executive to give them this status, because the registration of plenipotentiaries was the right of the Chancellor in his capacity as Prussian foreign minister. In the registry, the share of proxies rose steadily (see Figure 5). Their actual attendance in the *Bundesrat* increased even

more (see Figure 7). Over the years, the Prussian bench thus came to be dominated by federal executives (see Figure 9). As the proxies outnumbered the regular plenipotentiaries by three to one after the 1890s (see Figure 7), the federal administration gained complete control over the Prussian bench (see Figure 11).

The proxies were therefore a tool of federalisation. They gave the federal administration the opportunity to smuggle its executives into the *Bundesrat* through the backdoor, where they could advocate bills of the *Reichsämter* in the committees and push them through the plenary assembly. Rather than representatives of Prussian interests, they were advocates of the national government who appeared in Prussian disguise. The Prussian *Bundesrat* delegation thus became an assemblage of administrative experts from the federal departments.

This federalisation of the Prussian bench shows that the federal executive gradually seized control of the Prussian government rather than vice versa. Indeed, this process constituted a mediatisation of Prussia because the federal government deprived her of the core right that the constitution granted to each state, namely to participate in the national decision-making process independently.

One manifestation of this loss of independence was the low attendance of Prussian ministers in the *Bundesrat* (see Figure 12). During Bismarck's Chancellorship, they appeared on the Prussian bench sporadically. The years 1879 and 1880 were an exception, because at this time the chancellor encouraged the ministers of the states to visit the *Bundesrat* as part of his attempt to reform federal government by giving more weight to the plenary assembly. After 1896, the Prussian ministers more or less disappeared completely. Only the outbreak of the war led to a significant increase in their attendance. But this trend was short-lived; it lasted for no longer than two years.

With the exception of the years 1879 to 1880 and 1914 to 1916, the Prussian bench included more members of the Prussian State Ministry that did not preside over a ministry than proper ministers (see Figure 12). The non-ministerial members of the State Ministry

were usually high-ranking officials from the *Reichsämtler*, most often the state secretaries.³² In his capacity as Prussian king, the Emperor – the head of the federal administration – made them part of the Prussian cabinet, as the previous chapter has shown, in order to coordinate the policies of the Prussian and federal government.³³ The fact that they sat on the Prussian bench more often than the actual ministers was probably the clearest sign of how deeply the federal administration infiltrated the State Ministry and how much control it had over the Prussian *Bundesrat* delegation.

During the war, this mediatisation of the Prussian government led to protests in the House of Representatives. The criticism became most outspoken in the debate over whether the Prussian three-class franchise should be harmonised with the liberal electoral law of the *Reichstag* in order to make it easier for the Chancellor to coordinate Prussian and federal politics. In winter 1917, the conservative MP Ernst von Heydebrand und der Lasa complained that the Prussian cabinet comprised so many federal state secretaries ‘who have to follow the orders of the Chancellor in their position that a distinctive, independent Prussian government no longer exists’.³⁴ Exactly the same could have been said about the high number of federal executives on the Prussian *Bundesrat* bench.

In addition to the Prussian proxies, there was a second tool of federalisation in the *Bundesrat*: an elaborate system of substitutions among the small states. By ensuring that most of the small principalities usually voted with the Prussian bench, this system created the majorities necessary for legislative proposals of the Prussian-federal executive to be adopted.

The foundations of this system lay in the *Bundesrat* by-laws. In order to enable the state governments to take part in the voting process at all times, the by-laws determined that in the event of absence each directing plenipotentiary could delegate his right to cast the vote of his

³² See for example *Protokolle (PSM)*, vol. 9, 1900-1909, pp. 454f.

³³ On this practice, the so-called ‘Staatssekretarisierung’ of the Prussian cabinet, see Rosenau, *Hegemonie und Dualismus*, pp. 32-8.

³⁴ [‘die nach ihrer ganzen Stellung den Anweisungen des Herrn Reichskanzlers zu folgen haben, daß also ein eigenes, selbständiges Preußisches Staatsministerium gar nicht mehr existiert’] Quoted in Goldschmidt, *Kampf*, p. 124 and in Rosenau, *Hegemonie und Dualismus*, p. 37.

home government to any other plenipotentiary. It did not matter whether this substitute plenipotentiary came from the same state or not.³⁵ When Bismarck revised the by-laws in 1880 in order to encourage high-ranking officials from the states to attend the *Bundesrat*, this rule was tightened. From now on, substitute plenipotentiaries were forbidden to act on behalf of another state in two consecutive meetings. In other words, in at least every second meeting a state had to be represented by one of its home plenipotentiaries. Moreover, substitute plenipotentiaries were no longer allowed to take over the representation of more than one state unless the governments gave them express authority at the *Bundesrat* office in the Federal Department of the Interior.³⁶ After the war broke out, the number of meetings increased so much that these strict rules became impractical. In July 1915, the *Bundesrat* decided to suspend them for three months.³⁷ One year later, in August 1916, they were rendered inoperative for the duration of the war.³⁸

The small states made so much use of substitutions that they in effect gave up their independent participation in the *Bundesrat*. From the unification until the wartime revolution, the number of substitute plenipotentiaries that represented the small states surpassed that of their home plenipotentiaries every single year (see Figure 13). The share of the former was always over fifty per cent (see Figure 14). Until the beginning of the war, the pattern of attendance was very consistent. While substitute plenipotentiaries usually constituted sixty to seventy per cent of all small state representatives, the share of home plenipotentiaries lay between thirty and forty per cent. On average, a small state was thus represented by an official of another government in roughly two out of three meetings. Only in the second half of the 1890s did the number of substitute and home plenipotentiaries approach each other. While the former dropped by twenty per cent in comparison to the mid 1880s, the latter increased by ten per cent. The first years of the war led to an inflation of substitutions. In 1916, three out of

³⁵ *Geschäftsordnung* (1871), § 2.

³⁶ *Geschäftsordnung* (1880), § 2.

³⁷ *Protokolle (DR)*, 1915, session 43, 8 July, § 745, p. 619.

³⁸ *Ibid.*, 1916, session 40, 8 June, § 494, p. 454.

four attendants on the benches of the small states were substitute plenipotentiaries. After that year, the number of both substitute and home plenipotentiaries plummeted, mainly because the small states tended less and less to attend the *Bundesrat*. In the last year of the war, it happened more often that the benches of the small states were empty than that they were occupied by home plenipotentiaries.

The consistently high level of substitutions shows that the revision of the *Bundesrat* by-laws in 1880 and the tightening of the relevant rules did not have a great effect on the participation of the small states. They still delegated their voting rights to substitute plenipotentiaries overwhelmingly often (see Figures 13 and 14). The main reason why there was no significant drop in the number of substitutions was that the small states adjusted their registration policy. In order to continue the system of substitutions, they simply made the officials of other governments who acted on their behalf a regular part of their *Bundesrat* delegations by registering them as proxy plenipotentiaries. Until the reform in 1880, over eighty per cent of the substitute plenipotentiaries were not on record at the *Bundesrat* registry (see Figure 15). The state governments simply nominated them ad hoc before the relevant meeting. The reform changed this completely. From 1881 onwards, around ninety per cent of all substitute plenipotentiaries were registered as proxies.

By changing their registration policy, the small states undermined one of the central objectives of Bismarck's reform, namely to increase the attendance of high-ranking officials from the state governments. As the level of substitutions remained roughly as high as before (see Figures 13 and 14), the participation of the small states did not change at all. Bismarck did not mind this too much, however, as he was mainly concerned with increasing the attendance of the ministers from the more important middling states.³⁹ On the contrary: the continuation of the system of substitutions was in his interest, because the fewer

³⁹ See the report by the Wurttemberg envoy Carl von Spitzemberg to the Wurttemberg prime minister Hermann von Mittnacht, 15 March 1880, printed in Goldschmidt, *Kampf*, no. 74, p. 275.

plenipotentiaries there were the easier it was for him to control what the small states were doing in the *Bundesrat*.

The fact that already in the first year after unification the share of substitute plenipotentiaries reached nearly sixty per cent (see Figure 14) shows that the system of substitution was not a phenomenon that emerged over time, but rather an implied element of the constitution. At the time the constitution was framed, it was clear that many small states would find it difficult to participate in the decision-making of the *Bundesrat*. This was above all a question of money. It was expensive to fund an envoy of one's own – perhaps even more than one – in Berlin, not least because the representatives of the state governments were expected to take part in the social life at the Prussian court. For many small states, the maintenance of a permanent *Bundesrat* delegation simply exceeded their means.⁴⁰

This was a problem that had already occurred in the *Bundestag* of the German Confederation and in the Imperial Diet of the Holy Roman Empire.⁴¹ At the time of unification, Bismarck must have known about this issue, because he had been a member of the Frankfurt *Bundestag* for many years. In light of his aim to expand Prussia's hegemony, this awareness suggests that he created the institution of substitute plenipotentiaries not least in order to exploit the predicament of the small states in a manner that would make it easier to control them. If we look at it from this angle, the consistently high level of substitutions indicates that the voting behaviour of most small states depended on the Prussian bench, meaning on the preferences of the Prussian government and – after the Prussian *Bundesrat* delegation had been taken over by federal executives – of the federal administration.

⁴⁰ See Julia Cholet, *Der Etat des Deutschen Reiches in der Bismarckzeit* (Berlin: Berliner Wissenschafts-Verlag, 2012), p. 107.

⁴¹ On the financial difficulties of the small states in the Holy Roman Empire more generally, see for example Jürgen Ackermann's case study *Verschuldung, Reichsdebitverwaltung, Mediatisierung. Eine Studie zu den Finanzproblemen der mindermächtigen Stände im Alten Reich. Das Beispiel der Grafschaft Ysenburg-Büdingen, 1687-1806*, Schriften des Hessischen Landesamtes für Geschichtliche Landeskunde 40 (Marburg: Hessisches Landesamt für Geschichtliche Landeskunde, 2002).

This dependency becomes clear if we consider what states made use of substitutions and whom they chose to represent them. In general, there were three major groups among the small states (see Table 4). First, there was a small number of states that sent their own plenipotentiaries to the great majority of *Bundesrat* meetings: Hesse, Brunswick, Lübeck, and Mecklenburg-Schwerin. The latter formed a permanent coalition with its sister principality Mecklenburg-Strelitz, with the Schwerin plenipotentiary usually casting the vote for the Strelitz government (See Table 4). This joint *Bundesrat* delegation of the two grand duchies followed the vote of the Prussian bench in more or less all cases. The main reason for this loyalty was – as we will see in the next chapter – that the Mecklenburg governments needed the support of the Prussian and federal executive against the *Reichstag*, which was sharply critical of the antiquated corporative structures of the duchies and regularly demanded the introduction of proper constitutions.

While Hesse acted more independently in the plenary assembly, the Brunswick government too usually aligned itself with the Prussian bench, in particular from 1885 onwards. After the duke had died the year before, the following succession crisis – which will be one of the subjects of the next chapter – increased Prussia's influence in the northwest German principality greatly. This was reflected in the appointment of a Prussian prince as regent and later in the marriage of the new duke to a daughter of the Prussian king. Thanks to the support of the Mecklenburg duchies and Brunswick, the Prussian bench could rely on five additional votes in the *Bundesrat* for most of the time.

The second major group among the small states was composed of those principalities that changed from using substitute plenipotentiaries to instructing home plenipotentiaries or vice versa in the 1880s and early 1890s: Saxe-Weimar-Eisenach, Saxe-Coburg-Gotha, and Oldenburg (see Table 4). All three of these states modified their participation policy because they became part of different factions of small states that shared the same plenipotentiaries and thus usually voted together.

These voting blocs become clear if we look at the third group of small states, which comprised all those principalities that conferred their voting right on substitute plenipotentiaries in more than three-quarters of the *Bundesrat* meetings: Mecklenburg-Strelitz, Hamburg, Bremen, Saxe-Meiningen, Schaumburg-Lippe, Lippe, Anhalt, Saxe-Altenburg, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Reuß Senior Line, and Reuß Junior Line.

The three Hanseatic city-states formed a coalition under the direction of Lübeck, whose plenipotentiary usually cast the votes of the Bremen and Hamburg government. Thanks to their economic importance, the Hanseatic states were able to participate relatively independently in the decision-making of the *Bundesrat* for most of the time. This independence was reflected in the fact that in most meetings of the plenary assembly where none of their own envoys was present they mandated a Bavarian plenipotentiary with casting their vote rather than an official of a state that stood under Prussian control. By the time the war broke out, however, the Hanseatic governments were starting to draw closer to the Prussian bench. In 1914, they made Karl Sieveking – a scion of a great Hamburg family who worked as a federal administrator of Alsace-Lorraine and had been a member of the Prussian delegation until that year – their standard plenipotentiary (see Table 4).

Saxe-Meiningen relied on the Bavarian government much more than the North German cities. The small principality employed the services of Bavarian plenipotentiaries in the great majority of meetings (see Table 4). For reasons of geographic proximity, there was a natural overlap of interest, especially in economic and financial questions. This is why the Franconian state usually mandated an expert of the Bavarian fiscal administration with its representation.⁴²

⁴² The most important of these fiscal experts were Hermann von Stengel and Ferdinand von Raesfeld. For biographical information, see Lilla, *Föderalismus*, pp. 265, 495, 581f. On Saxe-Meiningen in the *Bundesrat*, see also Rauh, *Föderalismus*, p. 105.

Apart from the Hanseatic city-states and Saxe-Meiningen, no other small state managed to use the system of substitutions as a way to retain at least some scope of action in the *Bundesrat*. Rather, two factions evolved that both followed the Prussian bench more or less blindly. Lippe and Schaumburg-Lippe formed an alliance under the direction of Brunswick, Oldenburg, and occasionally Hesse. The central German principality of Anhalt also joined this group of northwest German states. That this coalition usually supported the Prussian bench became manifest in its choice of substitute plenipotentiaries (see Table 4). Between 1871 and 1885 this function was taken over by Gottlob von Liebe. The professional bureaucrat from Brunswick had already been a governmental envoy to the *Bundestag* of the German Confederation and to the parliament of the Erfurt Union, two positions in which he had advocated a close cooperation with Prussia. He continued to do so after he had become the Brunswick representative at the Prussian court in 1867.⁴³

For much of the 1900s, the leading plenipotentiary of the northwest German states was the Oldenburg envoy Georg Eucken-Addenhausen. His relations with the Prussian and federal executive could hardly have been closer. In the 1880s, he was a mayor of several cities in the Prussian-controlled Thuringian states, before he became an official in the Federal Department of the Interior in 1902.⁴⁴ The voting behaviour of the states that von Liebe and Eucken-Addenhausen represented depended of course on the instructions by the respective governments. But the appointment of these two officials as substitute plenipotentiaries was a clear sign that the northwest German governments tried to align their *Bundesrat* policies with the course of the Prussian bench as much as possible.

This meant that the Prussian and federal executive could usually rely on a further set of votes. In particular under Eucken-Addenhausen, the northwest German coalition benefitted from this cooperation. Before important decisions, the federal administration usually

⁴³ For biographical information on Liebe, see Lilla, *Föderalismus*, pp. 402f.

⁴⁴ For biographical information on Eucken-Addenhausen, see *ibid.*, pp. 227f.

exchanged information with him in order to enquire after the opinion of the governments he represented. As not many plenipotentiary enjoyed such a treatment, this practice gave his employers privileged access to information.⁴⁵

The biggest faction among the small states was composed of all Thuringian principalities but Saxe-Meiningen and Anhalt: Saxe-Weimar-Eisenach, Saxe-Coburg-Gotha, Saxe-Altenburg, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Reuß Senior Line, and Reuß Junior Line. Together, they had no fewer than seven votes, meaning one more than the second biggest state of the union, Bavaria. The dependency of this broad coalition on the Prussian bench was reflected in the fact that it began to form one uniform voting bloc precisely at the time when Bismarck demanded of the state governments that they stand together against the advance of the *Reichstag*. From 1880 onwards, the grand duchy of Saxe-Weimar-Eisenach took over the representation of six other Thuringian states (see Table 4). Only Saxe-Coburg-Gotha had a plenipotentiary of her own after 1890. But the small principality was in most respects an informal member of the coalition, because it always voted with its neighbours.

Until the end of the war, this Thuringian coalition had three main plenipotentiaries: Adolf Heerwart, Arnold Paulsen, and Karl Nebe (see Table 4). Each of them was a fiscal expert from the Weimar-Eisenach administration.⁴⁶ Their appointment as plenipotentiaries indicated that financial matters were the most important issue for the Thuringian principalities. As these mini states were financially and economically incapable of sustaining themselves, it was a matter of survival for them to be on good terms with the Prussian-federal executive. Due to this dependency, the Prussian and federal governments could force the Thuringian states by various forms of pressure to follow the Prussian bench in the *Bundesrat*. Particularly effective were threats in the field of infrastructure, because these microstates would have collapsed had

⁴⁵ Rauh, *Föderalismus*, p. 105.

⁴⁶ See Lilla, *Föderalismus*, pp. 303, 450f., 470f.

they been cut off from the rest of the union. The right of the Reich to regulate the administration of railways was thus a powerful source of leverage.⁴⁷ So was the right of the Emperor to decide about the building of fortresses.⁴⁸ For many structurally weak areas, the relocation of a local garrison would have been an economic disaster. In general, military affairs offered many ways to exert pressure on the small states. Since all of them were bound to Prussia by military conventions and as the Prussian king regulated the military administration of all regiments in the union, the Prussian bench could threaten them with a unilateral change of army arrangements at any time.⁴⁹ As the troops were essential for the public sector in every state, especially in the smallest among them, this threat probably supplied the most powerful leverage of all.⁵⁰

This wide range of possible means of pressure made it easy for the Prussian bench to bring the Thuringian states into line in the *Bundesrat*. The family relationships among the ruling dynasties were also helpful. The Hohenzollerns were closely related to most of the different branches of the House of Wettin. Particularly close were the relations to Saxe-Weimar-Eisenach, the very state whose plenipotentiaries led the voting bloc of the Thuringian states from 1880 onwards. Empress Augusta, the wife of William I, was a born princess of the small principality.⁵¹

Moreover, pragmatic reasons made it practically impossible for a coalition of so many small states to pursue independent policies in the *Bundesrat*. In the plenary assembly, the acting substitute plenipotentiary of the Thuringian coalition was the busiest man, as he had to cast each of the up to seven votes at the right time. The whole procedure was only possible

⁴⁷ RV (1871), art. 4.8, 41-47.

⁴⁸ Ibid., art. 65.

⁴⁹ Ibid., art. 61, 63.5.

⁵⁰ On these different means of pressure, see Rosenau, *Hegemonie und Dualismus*, pp. 51-3.

⁵¹ For a more general study on the political importance of the Hohenzollerns' family relations with other dynasties, see Daniel Schönplflug, *Die Heiraten der Hohenzollern: Verwandtschaft, Politik und Ritual in Europa 1640–1918* (Vandenhoeck & Ruprecht, 2013).

because each of the governments usually gave him the same instruction, namely to follow the Prussian bench.⁵²

For these reasons, the Thuringian principalities were in fact satellite states of Prussia in the *Bundesrat*. The Prussian bench could always count on their seven votes. Together with the support of the northwest German coalition and the two Mecklenburg duchies, this alliance granted Prussia between fifteen and eighteen additional votes, depending on the behaviour of the Hessian government. These were at least two more votes than Prussia needed in order to reach a majority. The Prussian bench thus usually did not have to fear that it would be outvoted and that its proposals would not be adopted, even if it faced opposition from the middling states. Indeed, throughout the imperial era, it happened only twice that the *Bundesrat* adopted an important law against the votes of the Prussian bench, namely when the states decided on the future seat of the Imperial Court and on a reform of the postage law in 1877 and 1880, respectively.⁵³

The high degree of control that the system of substitutions gave the Prussian bench over the *Bundesrat* is reflected in how the attendance of Waldeck-Pyrmont evolved over the years. The small Hessian principality was a special case among the small states. In October 1867, the chronically bankrupt microstate concluded an accession treaty with Prussia, which stipulated that the Prussian government take over the entire domestic administration of Waldeck-Pyrmont. The external relations of the principality – including those to the Reich and the other constituent states – were now exercised by officials who acted in the name of the prince, but were appointed and instructed by the Prussian government. In practice, Prussia

⁵² Rauh, *Föderalismus*, p. 104.

⁵³ Oliver F. R. Haardt, “The Kaiser in the Federal State (1871-1918),” *German History* 34, no. 4 (2016), pp. 536, 542f. Only a few days after the decision of the *Bundesrat*, the reform of the postage law was revised according to Prussian interest, see *ibid.* For this reason, one can even argue that the decision to locate the Imperial Court in Leipzig rather than Berlin – which had largely practical reasons, because the predecessor of the Imperial Court, the Federal Commercial High Court, had had its seat in Leipzig since 1869 – was the only important law of the imperial era that was adopted against the votes of the Prussian bench. The role of the Imperial Court and the controversy surrounding the reform of the postage laws will be further examined in Chapter 5.

thus took over the voting rights of the small state in the *Bundesrat*.⁵⁴ As Waldeck-Pyrmont had one vote, this arrangement meant that in practice Prussia had at her disposal eighteen rather than seventeen votes in the plenary assembly.

For the first twelve years after unification, the Prussian government usually delegated the casting of the Waldeck vote to the loyal Brunswick envoy Gottlob von Liebe, whom it appointed as substitute plenipotentiary (see Figure 16). When he fell sick in the mid-1880s, Prussia changed its policy. Until 1908, the Prussian executive who presided over the administration of Waldeck-Pyrmont, the so-called *Landesdirektor*, usually represented the Hessian principality in the *Bundesrat*. But the Waldeck bench was more and more often left empty. From the mid-1890s, the Waldeck vote was not cast in about thirty per cent of all meetings. The period between 1899 and 1901 was the first time that the Waldeck plenipotentiary was more often absent than present in the *Bundesrat* (see Figure 16). After 1907, this became the norm. Until the last year of the war, the bench of Waldeck-Pyrmont was usually empty in more than eighty per cent of all meetings, except for in the immediate pre-war years, when attendance climbed to over forty per cent.

The pronounced absenteeism of the Waldeck plenipotentiary is evidence that the Prussian-federal executive did not need the Waldeck vote in order to reach a majority in the *Bundesrat*. Due to the system of substitutions, the Prussian bench had such extensive control over the small states that it could easily make do without the one vote from the Hessian principality. In short: by the beginning of the 1900s, the Prussian bench had become completely dominant. But – and this is the crucial point – the dominance of the Prussian bench did not imply the dominance of Prussia, for by the turn of the century the Prussian *Bundesrat* delegation had already been taken over by federal officials. The system of substitutions now provided the federal rather than the Prussian government with reliable majorities.

⁵⁴ *Vertrag zwischen Preußen und Waldeck-Pyrmont, betreffend die Übertragung der Verwaltung der Fürstenthümer Waldeck und Pyrmont an Preußen*, 18 July 1867, especially art. 1, 9, available online <http://www.verfassungen.de/de/he/waldeck/verwaltungsuebertragung-preussen1868.htm> (first retrieved 20 September 2015).

The Context of Federal Government

The proxies on the Prussian bench and the system of substitutions among the small states turned the *Bundesrat* into an instrument of the federal administration. This transformation enabled the Chancellor and state secretaries to push their projects through without great consideration for the interests of the state governments. The changing modes of participation in the *Bundesrat* were thus crucial for the overall evolution of federal government. It is therefore worth taking a closer look at what role the benches of Prussia and the small states played in the four different periods of federal government that the previous chapter has identified. How did the *Bundesrat* delegations of Prussia and the small states relate to the functional change of the federal constitutional organs and to the constant centralisation of the federal system? And what part did they play in the conflict between monarchical and parliamentary power?

I. The Period of Administrative Centralism (1867-1879)

Soon after unification, the *Kanzleramt* and the gradually emerging *Reichsämtler* assumed ministerial functions, because they coordinated the legal, economic, and social integration of the new nation. This development made it necessary for federal executives to gain access to the *Bundesrat* in order to introduce and defend the legislative proposals they had prepared. The attendance of federal executives on the Prussian bench was therefore very high right from the beginning. Already in 1872, they outnumbered their Prussian colleagues in the plenary assembly for the first time (see Figure 10). But most of them came from the lower and middle ranks of the federal administration. The great majority did not exceed the

rank of a *Geheimer Oberregierungsrat*, a middle-level position.⁵⁵ This was not least due to the fact that the federal departments were not yet fully developed and needed time to grow into a fully-fledged bureaucratic apparatus.

The relatively low level of authority that the federal executives had was an important reason why the Prussian government still had control over the Prussian bench in this period. While in most meetings a federal official acted as the directing plenipotentiary who cast the Prussian vote, this position was taken over by high-ranking Prussian executives when really important questions were on the agenda. This was most obvious in regard to financial matters. In 1873, for example, the Prussian minister of finance, Otto von Camphausen, was directing plenipotentiary in the meeting about the federal budget, even though the president of the *Kanzleramt*, Rudolph von Delbrück – who assumed this function in almost every other meeting of that year – was present.⁵⁶ Whenever the *Bundesrat* decided about questions that were absolutely crucial for the course of national politics, such as the Proxy Law or the Anti-Socialist laws, Bismarck presided over the Prussian bench himself.⁵⁷

In general, high-ranking Prussian executives appeared on the Prussian bench very rarely, even if the meetings addressed important questions that concerned their area of responsibility. Even immediately after the unification, Prussian ministers hardly attended the plenary assembly at all (see Figure 12). This neglect offered the heads of the expanding federal administration the chance to use the *Bundesrat* as a platform to gain more influence in the Prussian State Ministry. Since Rudolph von Delbrück and Karl von Hofmann, the first two presidents of the *Kanzleramt*, acted as directing plenipotentiary of Prussia in the great

⁵⁵ In the first four years after unification, the highest-ranking federal official on the register – aside from the president of the *Kanzleramt*, Rudolph von Delbrück – was the Postmaster General Heinrich von Stephan. See *Handbuch*, 1874, pp. 4ff. and the registration lists in *Protokolle (DR)*, 1871, session 1, 20 February, § 2, pp. 2-4; 1872, session 7, 13 March, § 63, pp. 38-40; and 1873, session 3, 17 February, § 33, pp. 18-21.

⁵⁶ *Protokolle (DR)*, 1873, session 18, 4 May, pp. 147-55.

⁵⁷ See *ibid.*, 1878, session 9, 21 February, pp. 91-4, and session 39, 21 October, pp. 315-19.

majority of *Bundesrat* meetings, they were the first federal officials who were made non-ministerial members of the Prussian State Ministry.⁵⁸

Already in this early period of the Empire, the small states did not play an active role in the *Bundesrat*. The share of substitutions lay roughly between sixty and seventy per cent every year (see Figure 14). Even if the plenary assembly voted on matters that were of crucial importance to the states, such as the subsidies they had to pay to the Reich, most of the small-state governments did not send their own plenipotentiaries to Berlin.⁵⁹

It was simply not necessary for them to use the *Bundesrat* to make their voice heard. Delbrück and Bismarck included them in the preparation of important decisions even before legislative proposals were introduced into the *Bundesrat*. As the previous chapter has shown, the two leading figures of the regime of administrative centralism made federal good will – *Bundesfreundlichkeit* – a central principle of their approach to federal government, because they understood a close cooperation between the federal executive and the state governments as the best means to prevent a further expansion of parliamentary rights.

Monarchical solidarity was therefore one of the principal factors shaping the internal operations of the *Bundesrat* during these years. This was reflected in the attendance policy of the small states. The few meetings in which almost all of them made the effort to show up with their own plenipotentiaries were focussed on issues crucial to Bismarck's struggle with the *Reichstag*, such as the Anti-Socialist laws or the Proxy Law, which made the state secretaries functional proxies of the Chancellor and thus fostered demands for the introduction of responsible ministers.⁶⁰ As the monarchical governments needed to stay together in such matters, the small states refrained from using substitute plenipotentiaries, as they usually did, and instead made their presence felt.

⁵⁸ *Protokolle (PSM)*, vol. 6.2, 1867-1878, p. 762.

⁵⁹ *Protokolle (DR)*, 1876, session 4, 29 January, pp. 25-34, especially § 44, pp. 32-4. Most of the time, the small states did not even send own officials to the plenary assembly when it decided on the different parts of the federal budget. The year 1875 is a good example. See *Protokolle (DR)*, 1875, session 24-27, 13-24 October, pp. 301-55, and session 30-31, 7-10 November, pp. 377-400.

⁶⁰ *Protokolle (DR)*, 1878, session 9, 21 February, pp. 91-4, and session 35, 27 August, pp. 289-94.

Toward the end of the 1870s, the increasing centralisation in the *Kanzleramt* and the emerging *Reichsämler* made liberal calls for the introduction of responsible government louder than ever before. In order to keep the *Reichstag* in its place, the state governments started to assign more importance to the *Bundesrat*, because they wanted to strengthen its position as the central bulwark against parliamentary influence. After 1877, the small states tried to send more of their own officials to the meetings of the plenary assembly (see Figure 13). But these efforts did not suffice to protect monarchical power against the demands of an increasingly self-confident parliament. This is why, at the turn of the decade, Bismarck embarked on his attempt to redefine the system of federal government that had emerged since unification.

II. The Period of Confederate Restoration (1879-90)

In order to keep the *Reichstag* at bay, Bismarck wanted to restore the constitutional conditions that had been established at the time of unification. But his attempt to turn the *Bundesrat* into what it was supposed to be according to the constitution – namely a decision-making body of the ministers of the states rather than of the officials of the federal administration – failed miserably. Even after the reform of the by-laws in 1880, high-ranking officials from Prussia usually did not come to the plenary assembly, even if it decided on matters that were relevant for their ministries. While the attendance of Prussian ministers rose to an all-time high in 1880, it fell back to the old level within a year (see Figure 12). At the same time, the share of federal executives on the Prussian bench increased to sixty-five per cent (see Figure 11). After it had fallen by twenty per cent in the next two years, it climbed back to sixty per cent over the course of the 1880s.

The federalisation of the Prussian bench thus continued more or less unchecked. In the registry, the share of federal executives among the Prussian proxies skyrocketed from zero to

over fifty per cent in 1880 and then rose further over the next decade (see Figure 9). Around 1880, most of these proxies came from the Federal Department of Railway Affairs, because the division of competences between the Reich and the states in this field was highly controversial at this time, with Bismarck trying to make the building and operation of railways – two privileges of the states – a national competence.⁶¹ The presence of experts from the relevant federal department shows that the Prussian bench now began to work as an instrument of the federal rather than Prussian administration.

Indeed, Prussia's participation in the *Bundesrat* showed clear signs of the ongoing mediatization of the Prussian government. In 1881, the list of registered Prussian proxies included for the first time an official who held offices in both the Prussian and federal administration. Karl von Jacobi had been a low-ranking official in the Prussian ministry of commerce before he assumed – in addition – a post in the Federal Department of the Interior. From now on, he acted as an official of the federal administration who – as a reward – became state secretary of the Federal Treasury in 1886.⁶² His appointment as proxy plenipotentiary indicated that around 1880 the federal administration not only tightened its grasp around the Prussian bench, but also that it became more and more influential in the Prussian ministries.⁶³ An even clearer milestone in Prussia's gradual mediatization was passed in summer 1888. After Robert von Puttkamer's dismissal as Prussian minister of the interior, Karl Heinrich von Boetticher, state secretary of the Federal Department of the Interior and directing plenipotentiary of the Prussian bench in most meetings of the plenary assembly, became his successor as Vice-President of the Prussian State Ministry.⁶⁴

⁶¹ See for example the officials Daniel Körte and Ferdinand Kraefft in *Handbuch*, 1879, p. 6. One year later, the list of registered proxies also included Friedrich Schulz, an official from the Federal Agency for the Administration of Railways, a sub-agency of the Federal Department for Railway Affairs. See *ibid.*, 1880, p. 6.

⁶² For biographical information on Jacobi, see Lilla, *Föderalismus*, pp. 342f.

⁶³ For Jacobi's registration, see *Handbuch*, 1881, p. 6.

⁶⁴ *Protokolle (PSM)*, vol. 7, 1879-1890, p. 508.

On the participation of the small states, the reform of the by-laws did not have a great impact. By the aforementioned change of their registration policy, the small states managed to continue the system of substitutions just as they had previously done (see Figure 14). In fact, the share of substitute plenipotentiaries among all *Bundesrat* envoys from the small states increased even further, up to a level of seventy per cent in 1887. Only in the following year did it start to decline.

Overall, however, higher-ranking officials from the small states did attend the plenary assembly more regularly than in the 1870s. The main reasons for this development were simply the rising number of meetings and – above all – the increasing power of the *Reichstag*, to which the monarchical governments reacted by pooling their forces and taking collective action more often. The most important of these occasions were the recurring extensions of the measures against the Social Democrats and the adoption of a joint declaration against the introduction of parliamentarily responsible federal ministries in 1884. In the relevant meetings of the plenary assembly, the benches of the small states were packed with high-ranking officials.⁶⁵

But among these, there were only very few ministers. Most of the plenipotentiaries that represented the small states on such occasions were leading bureaucrats who were experts in the issue at stake. While Bismarck had hoped that the reform of the by-laws would make the plenary assembly a council of the state ministers, who would combine their authority in order to oppose the advance of the *Reichstag*, exactly the opposite happened. The small-state ministers retreated from the *Bundesrat*. It did not make sense for them to participate in the time-consuming sessions of the plenary assembly or the meetings of the committees, whose work required more and more specialised administrative expertise for addressing the increasingly complex public order. Together with the growing number of officials from the

⁶⁵ *Protokolle (DR)*, 1881, session 39, 22 November, pp. 277-80, and 1884, session 16, 5 April, pp. 95-8.

federal departments that acted as Prussian plenipotentaries, the bureaucrats on the benches of the small states gradually turned the *Bundesrat* into a council of administrative specialists.

This development facilitated the formation of permanent coalitions among the small states. Since the mid-1880s, the patterns of attendance on their benches had become more consistent than ever before, because most of them made the same administrative experts substitute plenipotentaries.⁶⁶ Adolf Heerwart, for example, a fiscal specialist from Saxe-Weimar-Eisenach, usually represented not only his home state, but also five other Thuringian states in the 1880s (see Table 4).

This uniformity, in turn, made it easier for the Prussian bench to control the voting behaviour of the small states. Prussia could thus afford to refrain more frequently from casting the Waldeck vote (see Figure 16). But as the Prussian bench became dominated by federal officials, its growing control over the *Bundesrat* increased the power of the federal rather than Prussian administration. By the end of Bismarck's chancellorship, the union was therefore undergoing not a restoration, but a federalisation of confederate structures.

III. The Period of the Formation of a Federal Government (1890-1914)

In the Wilhelmine era, the accelerating centralisation of the Empire made the Chancellor and the state secretaries evolve into an unofficial national government, the *Reichsleitung*, which became increasingly dependent on the majority parties in the *Reichstag*. This ascendancy of the *Reichsleitung* was based on the total control that it gained over the Prussian bench. After Bismarck resigned in 1890, the Prussian government tried at first to reclaim authority over its *Bundesrat* delegation. But it soon became clear that this was a vain hope. While the share of federal executives on the Prussian bench dropped marginally in 1890

⁶⁶ This consistency was most obvious in the year 1889. See *Protokolle (DR)*, 1889, session 1-36, 4 January-19 December, pp. 1-326 and *Handbuch*, 1889, pp. 10-14.

and then rose at a lower rate than for most of the 1880s, it climbed rapidly from 1893 onwards and eventually reached ninety-three per cent in 1910/11 (see Figure 11).

The mediatisation of Prussia could hardly have become more manifest. From the mid-1890s, there were more and more years in which Prussian officials did not preside over the *Bundesrat* bench on a single occasion, because the federal administration tightly controlled the position of directing plenipotentiary.⁶⁷ Out of forty-five meetings of the plenary assembly in 1910, there were only fourteen in which at least one representative of the Prussian government appeared in the *Bundesrat*. In all other cases, federal executives had the Prussian bench for themselves.⁶⁸ The ministers of the State Ministry no longer played any role in the *Bundesrat*. In 1903 and 1911, they did not attend once (see Figure 12).

But the clearest sign of Prussia's complete mediatisation was that from the 1890s, executives of the federal administration who hailed from other constituent states became part of the Prussian *Bundesrat* delegation. From 1891 to 1897, for example, the state secretary of the Federal Foreign Office, Adolf Marschall von Bieberstein, was registered as a regular plenipotentiary for Prussia, although he had a professional background in Baden, where he had been an MP before he became the envoy of the ducal government in Berlin.⁶⁹ Registrations such as his, which were motivated by federal interests only, demonstrate that the Prussian government was no longer independent in any real sense.

It is striking that in this process of federalisation executives who held posts in both the Prussian and federal administration did not play a major role, even though they were usually quite high-ranking. Between 1892 and 1913, there was no year in which more than three such representatives appeared in the plenary assembly (see Figure 10). This lack of hybrid office

⁶⁷ See for example *Protokolle (DR)*, 1895, session 1-40, 10 January-19 December, pp. 1-485; 1898, session 1-38, 7 January-20 December, pp. 1-581; 1899, session 1-40, 5 January-21 December, pp. 1-487; and 1900, session 1-31, 4 January-18 December, pp. 1-734.

⁶⁸ *Ibid.*, 1910, session 1-45, 6 January-16 December, pp. 1-616.

⁶⁹ *Handbuch*, 1891-1897, p. 5 in each volume.

holders reflected the loss of coordination between the policies of the Prussian State Ministry and the *Reichsleitung*.

Moreover, throughout the Wilhelmine era there was no significant increase in the attendance of officials from the army and navy, even though military issues such as the naval construction programme dominated the political agenda. After Bismarck's dismissal, military officials appeared on the Prussian bench more or less as often as before (see Figure 10). In the last years before the war, they hardly showed up at all. Inside the *Bundesrat*, there were therefore no signs of a militarisation of Wilhelmine government.

For the small states, Bismarck's resignation was a great turning point. On the one hand, they could no longer count on being included in important decisions of the federal executive, because the new political leaders did not make *Bundesfreundlichkeit* a central principle of their approach to federal government. On the other hand, the end of Bismarck's authoritarian style of leadership gave the small states more freedom of action. In the 1890s, they thus made careful attempts to reassert their authority in the plenary assembly. The level of substitutions dropped to around fifty-five per cent, because the small state governments now tried more often to use the *Bundesrat* as a platform for their demands (see Figure 14).

But this strategy soon turned out to be ineffective. The officials from the small states simply did not have the necessary expertise and resources to participate on an equal footing in the most important federal decisions, which became more and more complex because of ongoing centralisation, industrialisation, and economic, military, and colonial expansion. The middling states too had this problem. Most of the time, they did not manage to make use of their numerical dominance in the committees, because they were unable to negotiate on equal terms with the experts of the federal administration, who had access to privileged information and could draw on the great resources of a constantly expanding apparatus of federal departments and agencies.

But while the middling states could at least try to make their interests heard, the small states were reduced to the role of mere bystanders. For most of them, participating in the committees in the person of an official from their own administrative was not an option. It was simply too expensive to fund such a plenipotentiary and to equip him with the administrative assistants necessary to take part in the work of the committees. The powerlessness of the small states became manifest, for example, in the context of the dispute about the peacetime strength of the army in 1893. The negotiations between the *Reichsleitung* and the *Reichstag* excluded them completely. Their role was limited to providing a uniform front for the monarchical governments against the most ambitious demands of the parliament. For this purpose, they sent officials of their own governments to the meeting of the plenary assembly in which the Chancellor asked the *Bundesrat* to dissolve the *Reichstag* in case the parliamentary parties would not accept the conditions of the *Reichsleitung*. With the exception of Schwarzburg-Sondershausen and Reuß Senior Line, all of the small states voted in favour of a motion to this effect. They followed the Prussian bench more or less blindly and thus paved the way for a deal between the *Reichsleitung* and the *Reichstag* on which they had hardly any influence.⁷⁰

After 1900, the increasing dependency of the *Reichsleitung* on the *Reichstag* sidelined the monarchical governments so much that the small states became lethargic in the *Bundesrat*. The share of substitute plenipotentiaries on their benches climbed back to over sixty per cent (see Figure 14). The great difference to the 1870s and 1880s was that now the small states no longer made the effort to select their plenipotentiaries for each meeting of the plenary assembly according to the issue that was up for decision. Rather, they mandated one and the same substitute plenipotentiary – usually an expert on financial matters – with representing

⁷⁰ *Protokolle (DR)*, 1893, session 19, 6 May, § 305, p. 143. See also *ibid.*, session 31, 20 July, § 477, p. 232, where the *Reichstag* informs the *Bundesrat* that it has accepted the bill without further amendments. On the conflict about the peacetime strength of the army and its impact on the constitutional system, see Huber, *Verfassungsgeschichte*, vol. 4, § 31, especially pp. 554f.

them in all meetings. From the mid-1890s onwards, the patterns of substitutions among them were thus completely consistent.⁷¹

This lethargy of the small states further increased the control that the Prussian bench wielded over them. In 1898, it happened for the first time that a small state – namely Brunswick – appointed a Prussian official rather than an executive from one of the other small states or the middling states as plenipotentiary.⁷² Due to an ongoing succession crisis – which we will examine in the next chapter – the northwest German duchy was particularly susceptible to direct interventions from the Prussian delegation. Since the small states now followed the Prussian bench in more or less every decision, it was no longer necessary for the Prussian-federal executive to rely on the Waldeck vote. By 1910, the Waldeck bench remained empty in more than eighty per cent of all meetings of the plenary assembly (see Figure 16).

The last great legislative projects before the war revealed how helpless the small states had become. When pushing the various reforms of the fiscal system through the *Bundesrat*, the *Reichsleitung* overwhelmed the other states by the sheer number of financial experts from the federal departments whom it sent to the committees and the plenary assembly. Against this gathering of experts the small states, in particular, had neither the means nor the authority to stand up. They thus did not even attempt to make an active contribution, but simply supported the Prussian bench in every decision, even if the measures they adopted violated some of their

⁷¹ The year 1896 is a good example. In forty-four meetings of the plenary assembly, Adolf Heerwart from Saxe-Weimar-Eisenach took over the representation of Schwarzburg-Sondershausen and Reuß Junior Line forty-four times and of Schwarzburg-Rudolstadt and Anhalt forty-three-times. Bavaria and Mecklenburg-Schwerin provided Saxe-Meinigen and Mecklenburg-Strelitz with substitute plenipotentiaries in each meeting. The Hessian envoy Karl Neidhardt acted on behalf of Lippe and Schaumburg-Lippe in all but four and three meetings, respectively. Lübeck, Hamburg, and Bremen were represented by a Hanseatic official in every single meeting, most often by the Lübeck plenipotentiary Karl Peter Klüggmann. See *Protokolle (DR)*, 1896, session 1-44, 9 January-17 December, pp. 1-428.

⁷² *Handbuch*, 1898, p. 13. The plenipotentiary in question was Albert Halley, an executive of the ministry for Alsace-Lorraine, who also acted as commissioner of the Alsatian administration in the plenary assembly. See *ibid.*, pp. 8, 16.

most important rights, such as the monopoly of the states on direct taxation.⁷³ This shows that by the eve of World War I, the Prussian bench had gained so much control over the votes of the small states that the *Bundesrat* was in practice a sanctioning machine of the federal administration.

IV. The Period of Wartime Collapse (1914-1918)

After the outbreak of World War I, the *Bundesrat* regained its position as the central organ of federal government, because it was equipped with comprehensive emergency decree powers. But as the Prussian proxies and the system of substitutions had long federalised the council, this wartime regulation empowered the *Reichsleitung* rather than the monarchical governments. Still, in 1914 the share of Prussian executives on Prussia's bench rose to nearly twenty per cent for the first time in over ten years (Figure 11). But this did not reflect a reassertion of power by the Prussian government. Rather, the increase in attendance was due to the insistence of the *Reichsleitung* that the most fundamental decisions at the beginning of the war – most importantly the declaration of war – had to be adopted by the highest-ranking Prussian representatives in order to demonstrate solidarity.⁷⁴ This is the reason why there was an unusually large number of ministers among the Prussian plenipotentiaries who attended the plenary assembly in 1914 and 1915 (see Figure 12).

⁷³ See for example *Protokolle (DR)*, 1913, session 12, 28 March, pp. 391-404, especially §§ 420, 441f., pp. 392, 396f. In the meeting, the plenary assembly adopted the laws introducing a capital gains tax and an extraordinary defence contribution, two direct federal taxes. On the Prussian bench, there were no less than ten financial experts from the federal departments, most of them from the Federal Treasury. Except for the Hanseatic city states, the small states did not send own officials to the meeting, but made do with the usual substitute plenipotentiaries. In contrast to the Bavarian and Baden government, they accepted the Prussian proposal without any complaint.

⁷⁴ *Protokolle (DR)*, 1914, session 27, 1 August, pp. 401-10, especially § 664, pp. 405-406b. In this session, Chancellor Bethmann Hollweg gave a detailed report about the political situation. After that, the states approved the declaration of war. The Prussian delegation included no less than seven ministers of the Prussian cabinet (this count excludes the Chancellor and four ministers without portfolio), more than in any other meeting since unification.

In the following three years, the share of Prussian executives fell again, while that of federal officials climbed to over ninety per cent (see Figure 11). This total federalisation of the Prussian bench and the mediatisation of the Prussian government that it reflected were cornerstones of the centralised wartime order. After 1916, hardly any minister of the Prussian government appeared in the plenary assembly (see Figure 12). Already the year before, the Prussian bench included no other officials but federal executives in more than a quarter of all meetings.⁷⁵

In a way, this dominance of federal office holders was a wartime necessity. The main responsibility of the *Bundesrat* was to regulate the wartime economy in order to prevent the home front from collapsing. This function required the expertise of administrative specialists from the federal departments. Due to the wide range of technical details that the *Bundesrat* had to address, most of these experts did not even come from one of the military agencies. The head of the *Kriegsamt*, which was founded in 1916, attended the *Bundesrat* no more than five times.⁷⁶ By far the largest number of the federal executives came from the Federal Department of the Interior, the Federal Treasury, and specialised subagencies, such as the Federal Office for Canal Routes.⁷⁷

The share of military officials on the Prussian bench did not increase after the outbreak of the war as much as one might expect. It never exceeded seven per cent of all Prussian plenipotentiaries (see Figure 11). The Federal Department of the Navy was hardly present at all. In 1915, no representative of the navy showed up all year.⁷⁸ This absence of military

⁷⁵ Namely in twenty-four out of eighty-two meetings. See *Protokolle (DR)*, 1915, session 1-82, 5 January-22 December, pp. 1-1080.

⁷⁶ See *ibid.*, 1916, session 1-85, 6 January-21 December, pp. 1-1033; 1917, session 1-74, 4 January-22 December, pp. 1-766; 1918, session 1-66, 3 January-19 December, pp. 1-1544. The most important occasion where this official – at the time Wilhelm Groener – appeared was the meeting that introduced compulsory labour for all men between seventeen and sixty. *Ibid.*, 1916, session 74, 21 November, pp. 921f.

⁷⁷ Since his appointment as Prussian proxy plenipotentiary on 6 May 1915, the President of the Federal Office for Canal Routes and Director of the Food Supply Section in the Federal Department of the Interior, Georg Kautz, participated in thirty-one of the fifty-one remaining meetings of that year. See *Protokolle (DR)*, 1915, session 31-82, 6 May-22 December, pp. 390-1080.

⁷⁸ See *Protokolle (DR)*, 1915, session 1-82, 5 January-22 December, pp. 1-1080. In 1914, navy officials appeared in the plenary assembly five times, in 1916 six times, in 1917 five times, and in 1918 two times.

officials was simply due to the fact that the *Bundesrat* played no role in executive decision-making during the war. It was a purely administrative body. The course of government was determined by the Supreme Army Command, the *Reichsleitung*, and the *Reichstag* rather than by the council of states.

The participation of the small states did not change much after the outbreak of the war and the adoption of the Enabling Act. The patterns of substitutions that had evolved in the previous decades stayed largely the same (see Table 4). A few states registered additional plenipotentiaries, because the number of meetings rose so much during the war that a single plenipotentiary could hardly attend them all.⁷⁹ The reform of the by-laws in 1915 made the system of substitutions even easier, as the states no longer needed to register those substitute plenipotentiaries that represented them in more than one meeting of the plenary assembly. The share of substitutions among all small state plenipotentiaries thus increased to an all-time high of nearly seventy-four per cent in 1915 (see Figure 14). Only in 1918 did it drop to the fifty per-cent level, because the state governments decided more and more often that it was not worth having any representative in the plenary assembly. Their increasing absence was a clear sign of the growing disintegration of the constitutional structures in the last year of the war.

Higher-ranking officials from the small states did not come to the *Bundesrat* at all during the war. Their attendance was simply unnecessary since the governments had declared their unequivocal support for the wartime efforts of the *Reichsleitung* in August 1914.⁸⁰ The states adopted every important measure that the federal administration proposed unanimously. This solidarity among the benches of the different states made the *Bundesrat* an anchor of stability

See *Protokolle (DR)*, 1914, session 1-67, 8 January-22 December, pp. 1-787; 1916, session 1-85, 6 January-21 December, pp. 1-1033; 1917, session 1-74, 4 January-22 December, pp. 1-766; 1918, session 1-66, 3 January-19 December, pp. 1-1544.

⁷⁹ See for example *Protokolle (DR)*, 1914, session 37-38, 14-18 August, §§ 738, 742, pp. 492, 496, where the governments of Schaumburg-Lippe, Lippe, and Anhalt registered the Brunswick envoy Johannes Boden as additional plenipotentiary.

⁸⁰ *Ibid.*, session 27, 1 August, § 664, pp. 405-406b.

in a wartime order of government that was quite volatile because of the permanent struggle between the Supreme Army Command, the *Reichsleitung*, and the *Reichstag*.

This stability of the *Bundesrat* was not least due to the fact that it had evolved into a purely administrative body of bureaucratic experts. This became obvious when the monarchy collapsed in autumn 1918. After the revolution had broken out, the ministers of all state governments resigned collectively from their positions as *Bundesrat* plenipotentiaries.⁸¹ In contrast, the specialists from the *Reichsämtter* and the administrative agencies of the states remained plenipotentiaries even after Germany had been proclaimed a republic. This continuity of functional elites shows that the *Bundesrat* was no longer a political organ of the monarchical governments. Indeed, it treated the introduction of responsible government in October as a purely administrative act that it noted down in its protocols just like any other decision.⁸²

This brief overview of the history of the Empire has shown that the evolution of the participation of the states in the *Bundesrat* was directly related to the functional change of the constitutional organs and the centralisation of the federal system. By taking over the Prussian bench and exploiting the weakness of the small states, the federal administration – which gradually expanded due to the constant shift of competences from the states to the national level – gained full control over the *Bundesrat*. This federalisation of the council greatly enhanced the power of the Chancellor and the state secretaries, who evolved into a proper national government that could pursue its agenda without much consideration for the interests of the state governments, a development that, in turn, reinforced the centralisation of the Empire. At the same time, the transformation of the *Bundesrat* into a compliant sanctioning machine of a federal ministerial apparatus deprived it of its role as the principal antagonist of

⁸¹ Ibid., 1918, session 64, 5 December, § 1054, pp. 1514f.

⁸² Ibid., session 60, 28 October, § 984, pp. 1074f.

the *Reichstag*. It no longer constituted a collective government of the union that could shield the Chancellor from parliamentary influence. The federalisation of the council of monarchical governments thus went hand in hand with the parliamentarisation of the constitutional order.

Figure 2: Number of Bundesrat Meetings Per Year, 1871-1918

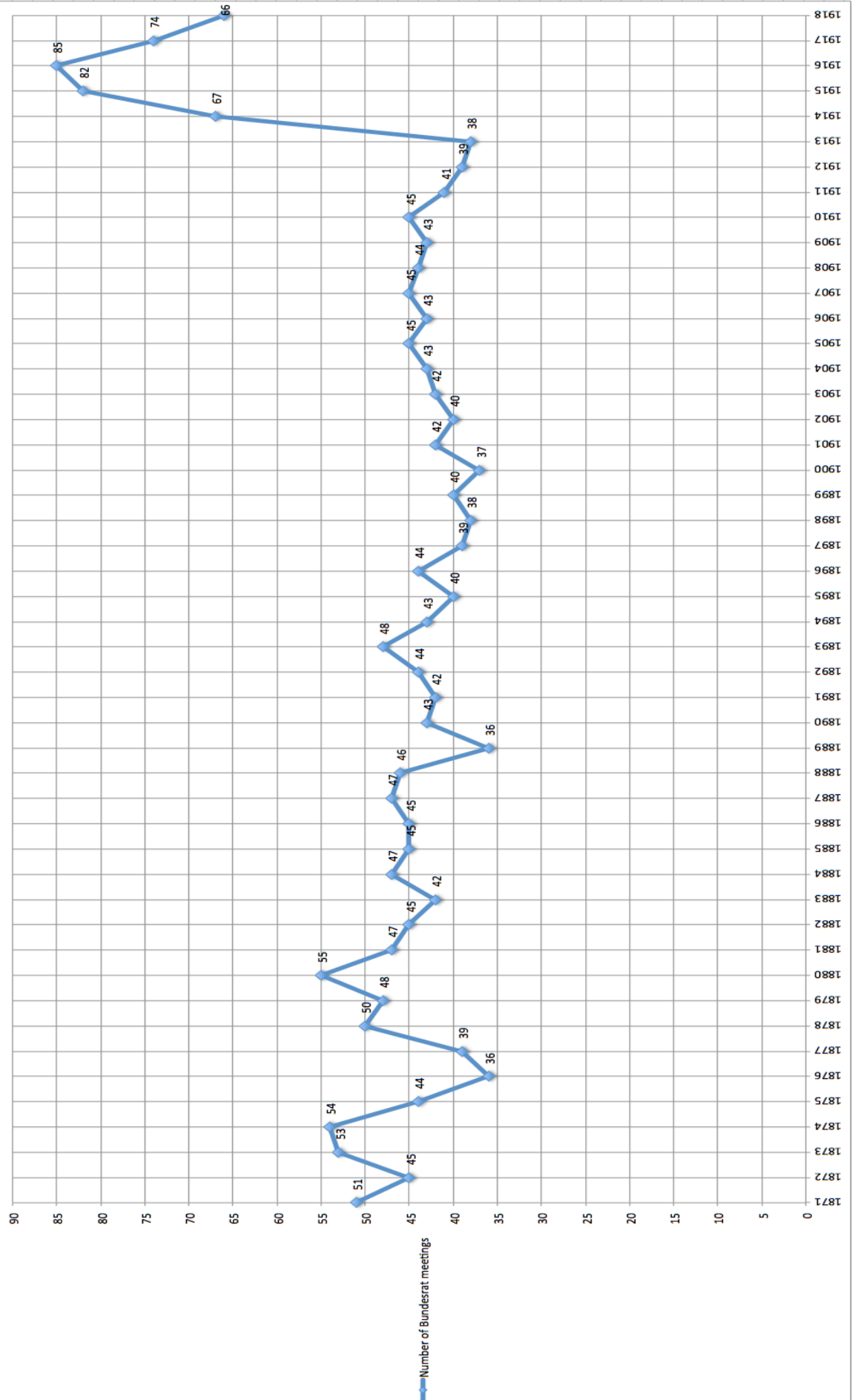


Figure 3: Attendance of Prussian Plenipotentiaries Per Year, 1871-1918

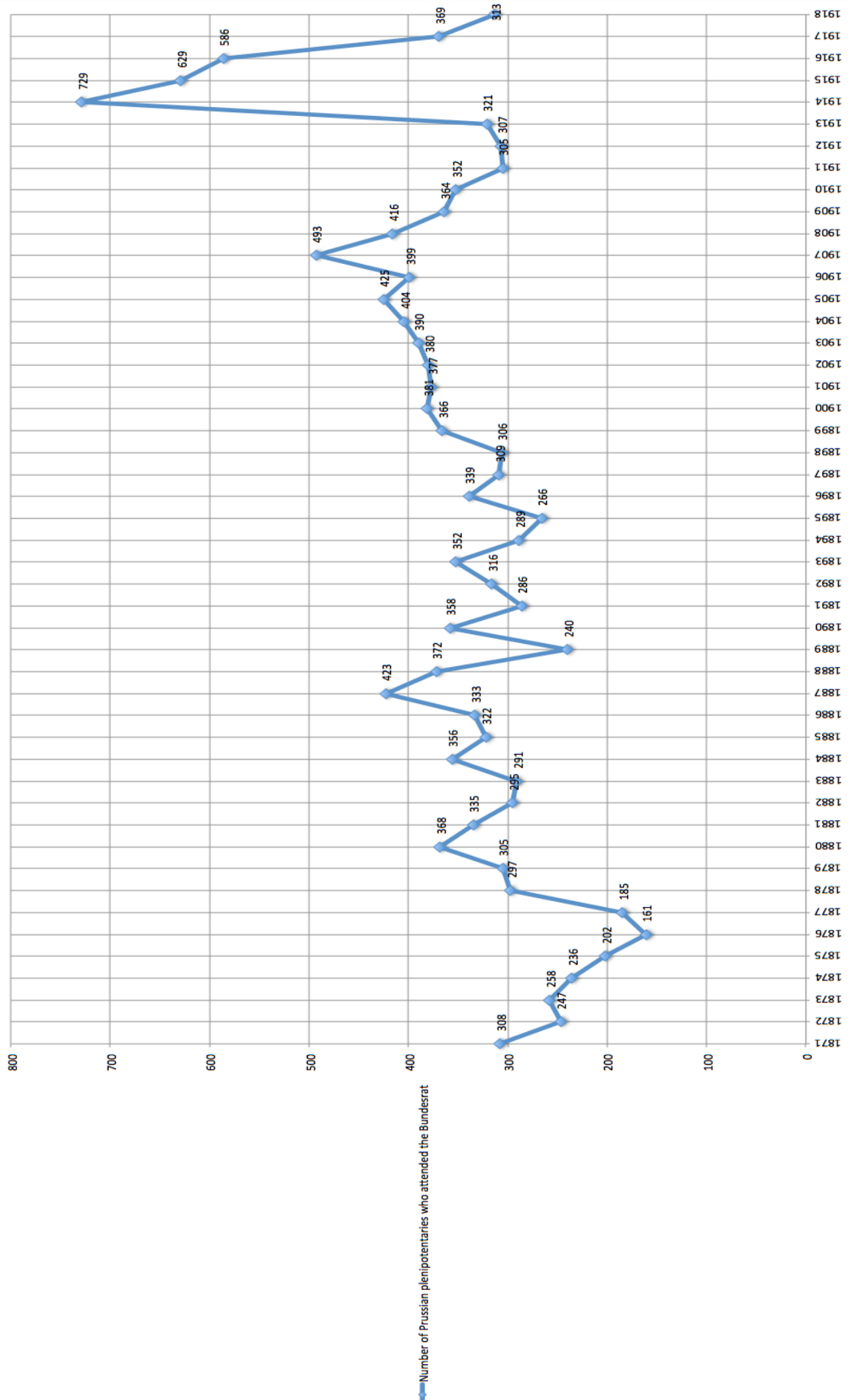


Figure 4: Status of Prussian Plenipotentiaries in the Bundesrat Registry (Total Numbers), 1871-1918

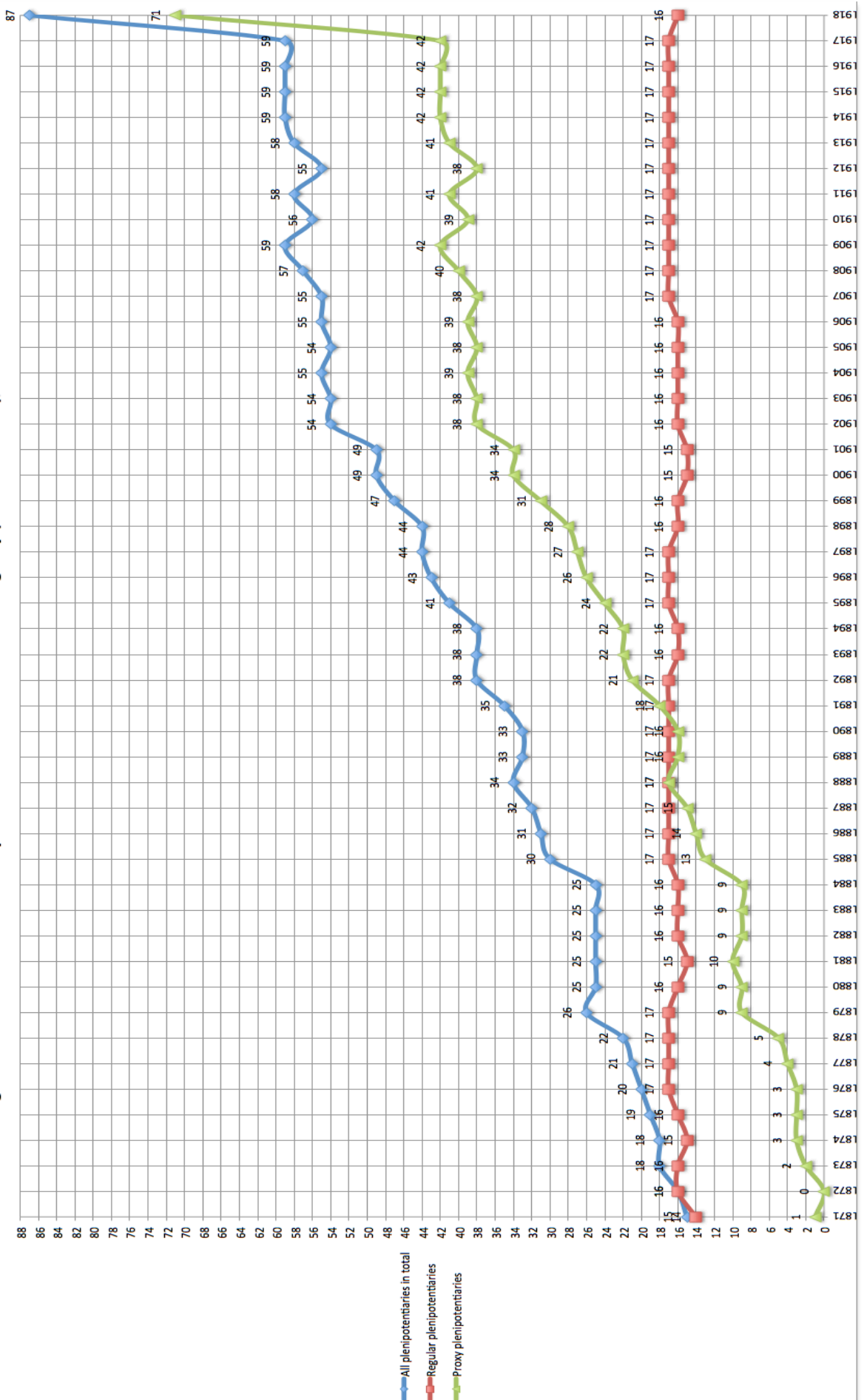


Figure 5: Status of Prussian Plenipotentiaries in the *Bundesrat* Registry (Per Cent), 1871-1918

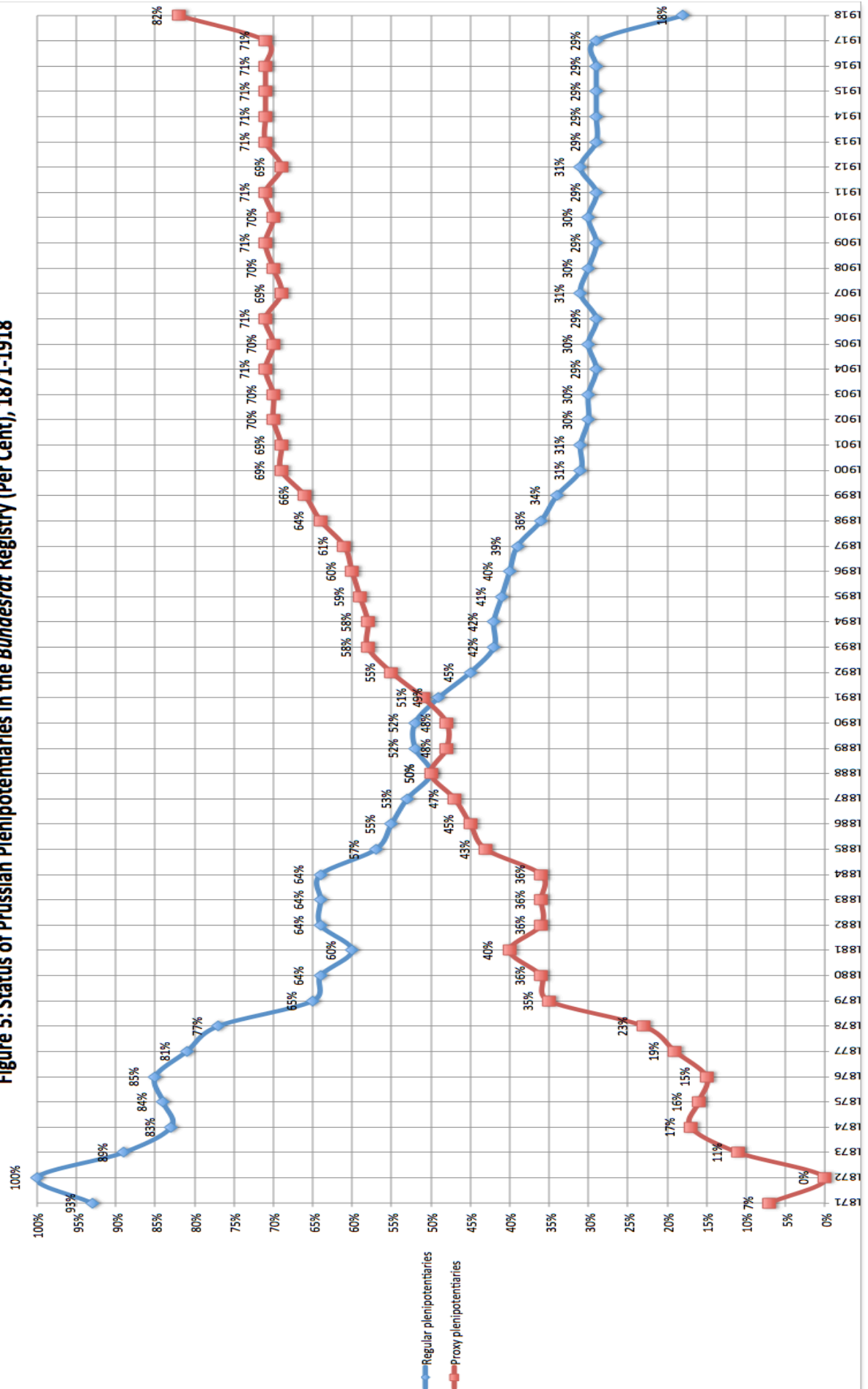


Figure 6: Registration Status of the Prussian Plenipotentiaries Attending the Bundesrat (Total Numbers), 1871-1918

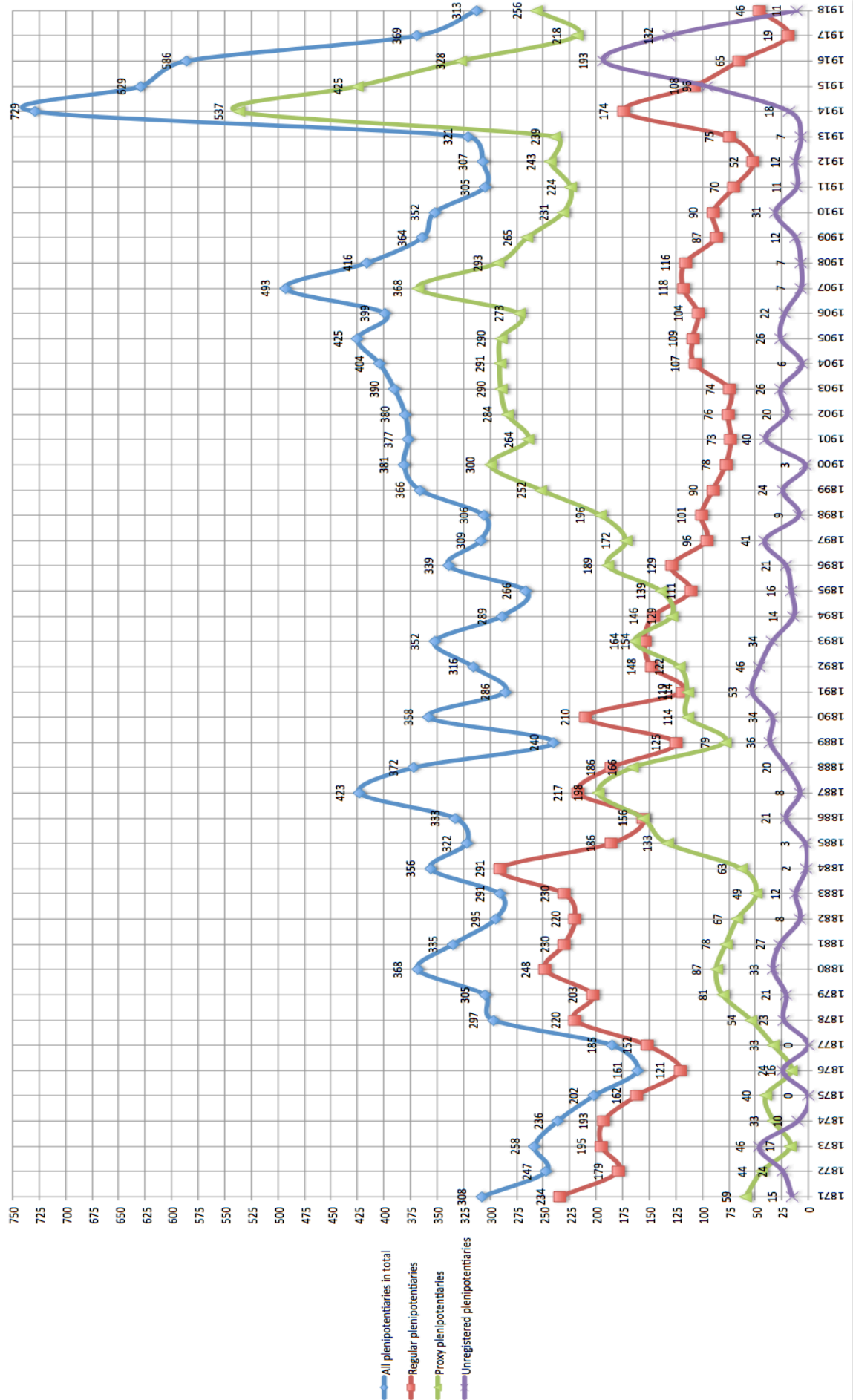


Figure 7: Registration Status of the Prussian Plenipotentiaries Attending the Bundesrat (Per Cent), 1871-1918

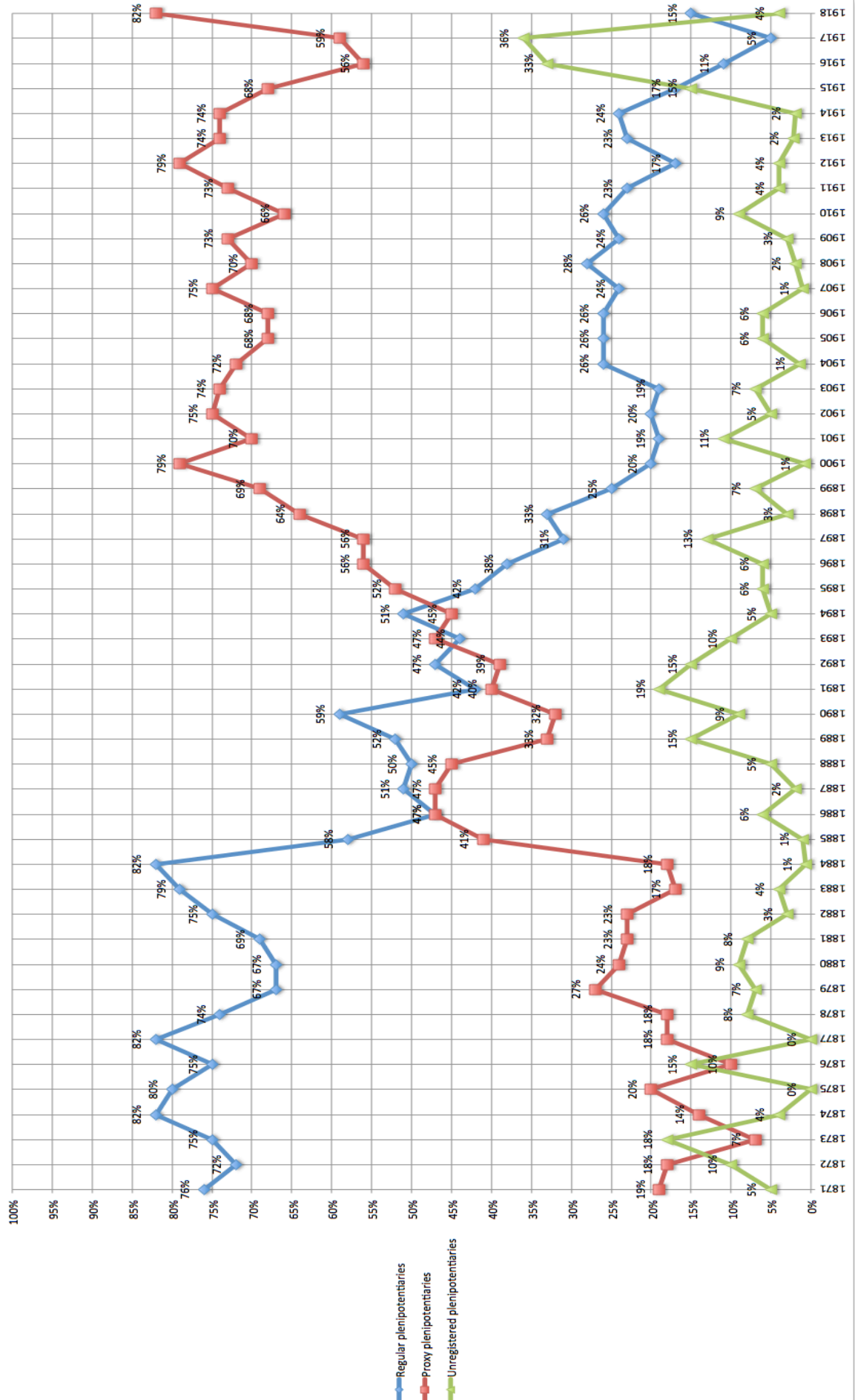


Figure 8: Professional Background of the Prussian Proxy Plenipotentiaries in the Bundesrat Registry (Total Numbers), 1871-1918

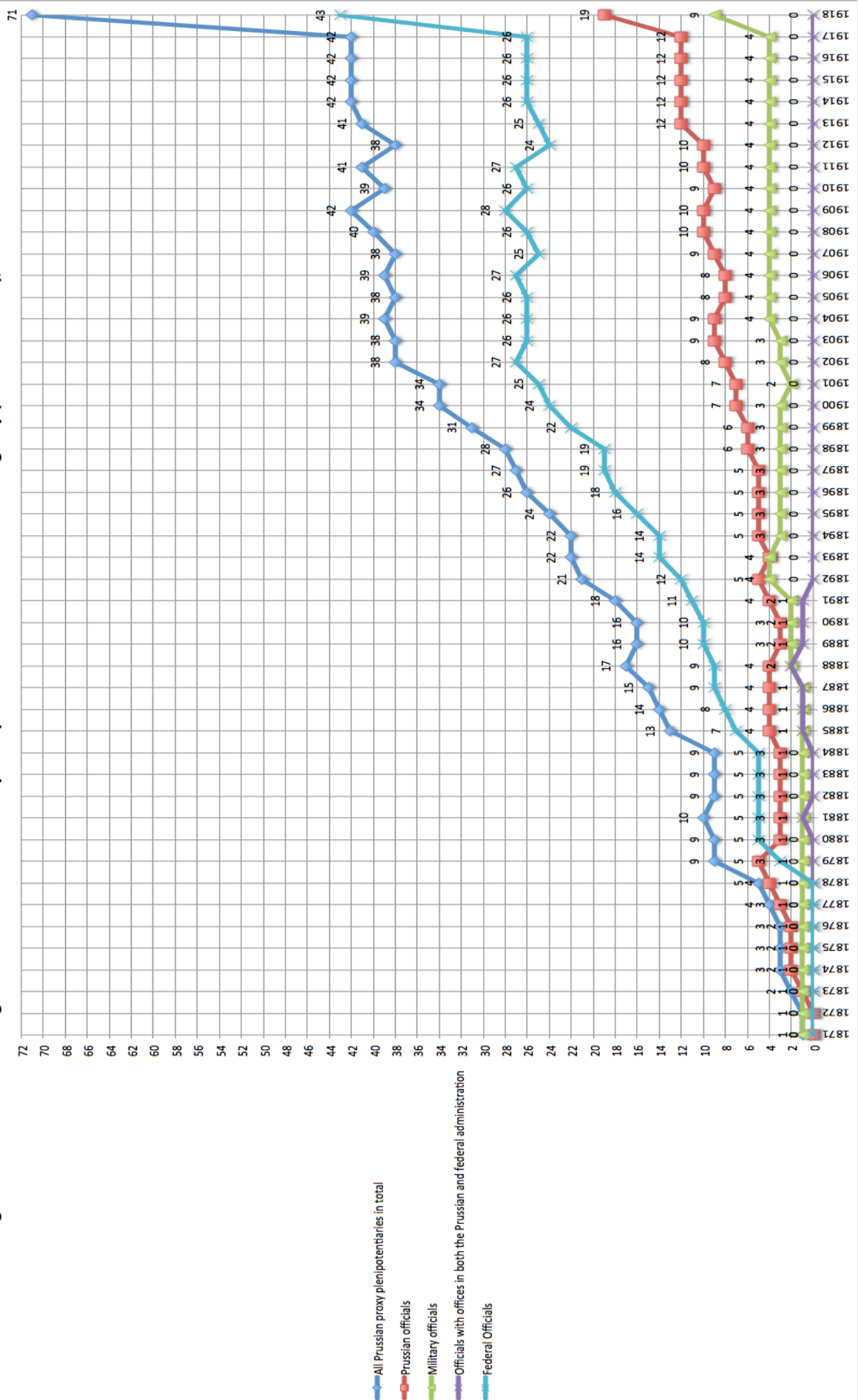


Figure 9: Professional Background of the Prussian Proxy Plenipotentiaries in the *Bundesrat* Registry (Per Cent), 1871-1918

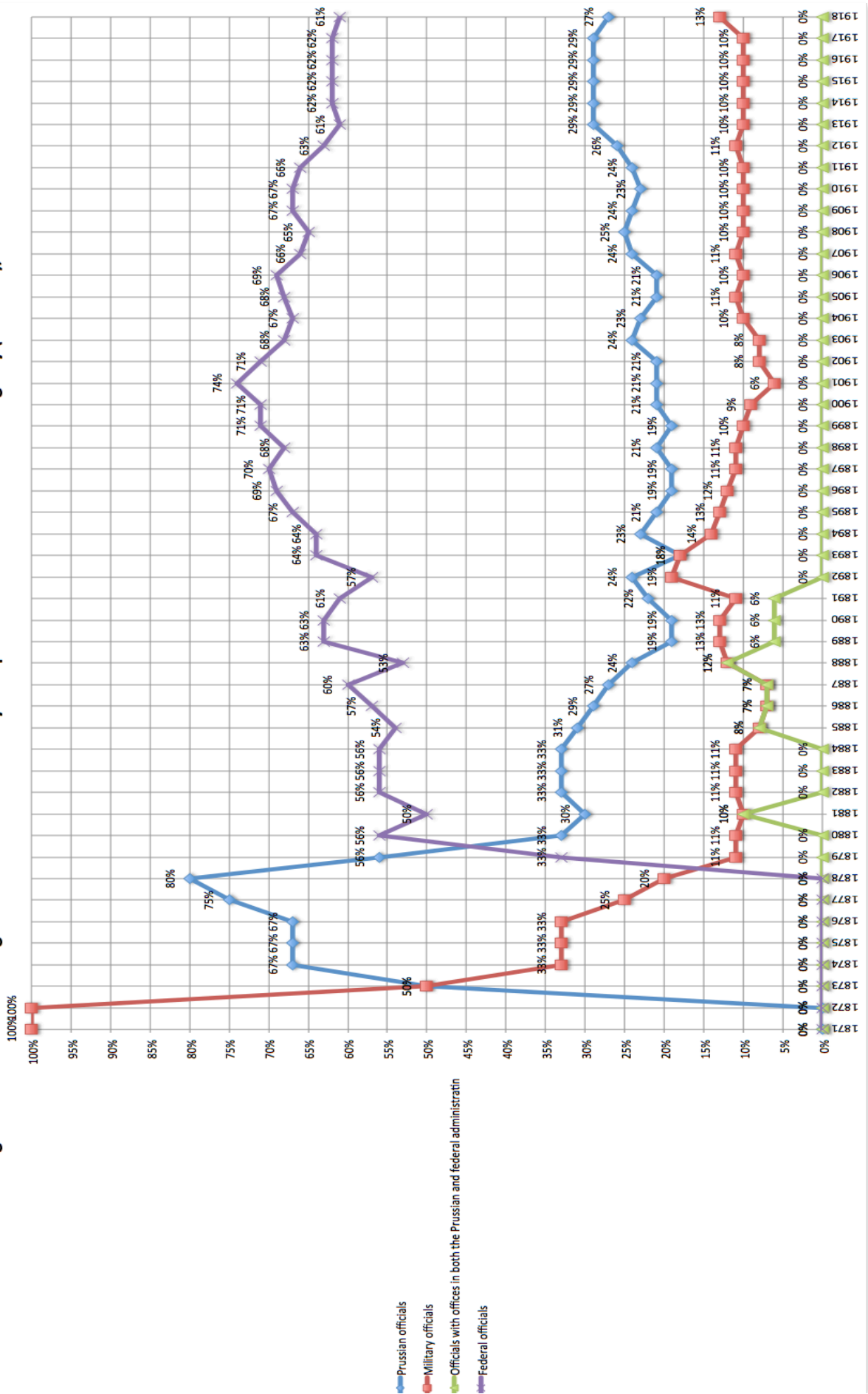


Figure 10: Professional Background of Prussian Plenipotentiaries Attending the *Bundesrat* (Total Numbers), 1871-1918

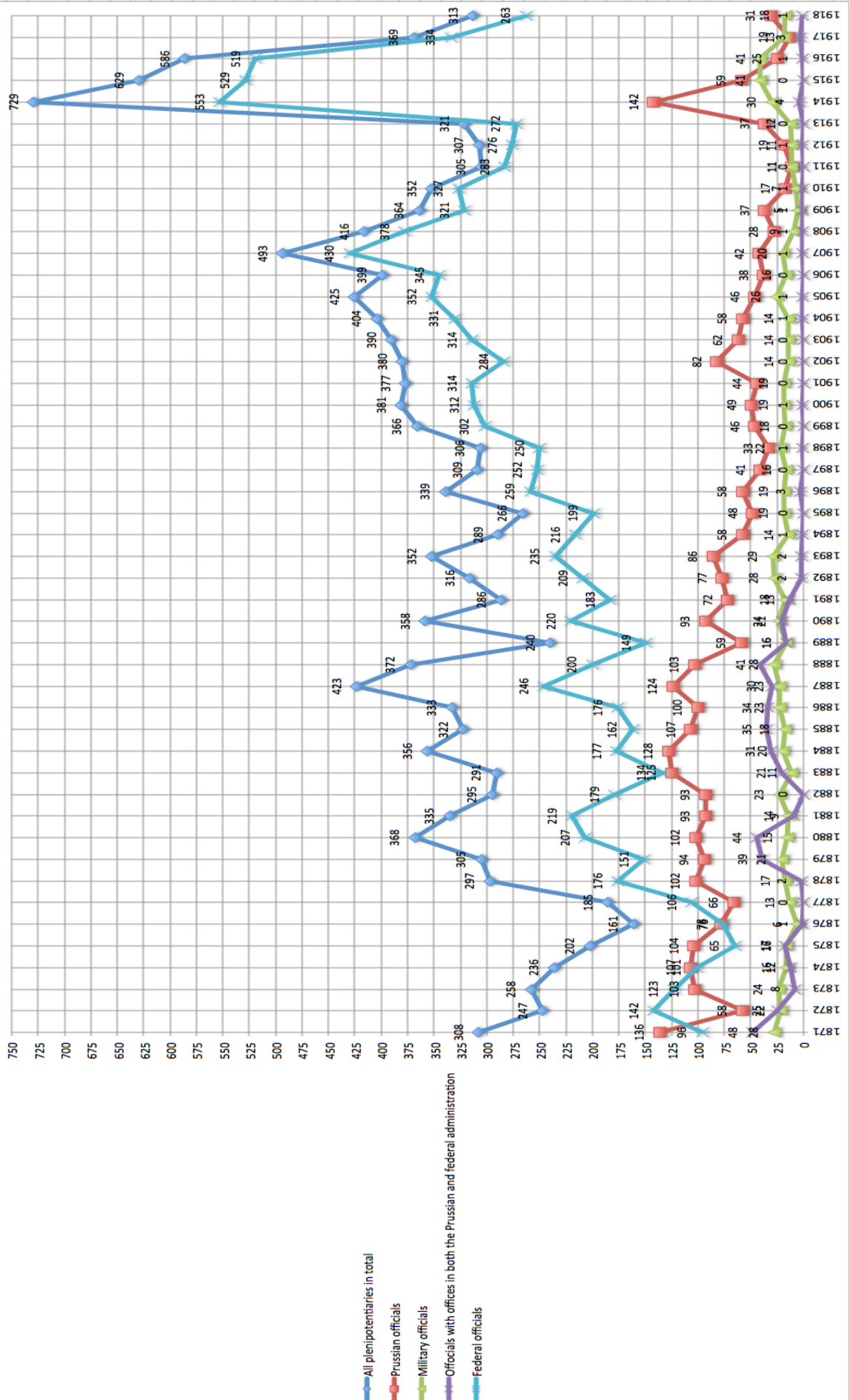


Figure 11: Professional Background of Prussian Plenipotentiaries Attending the *Bundesrat* (Per Cent), 1871-1918

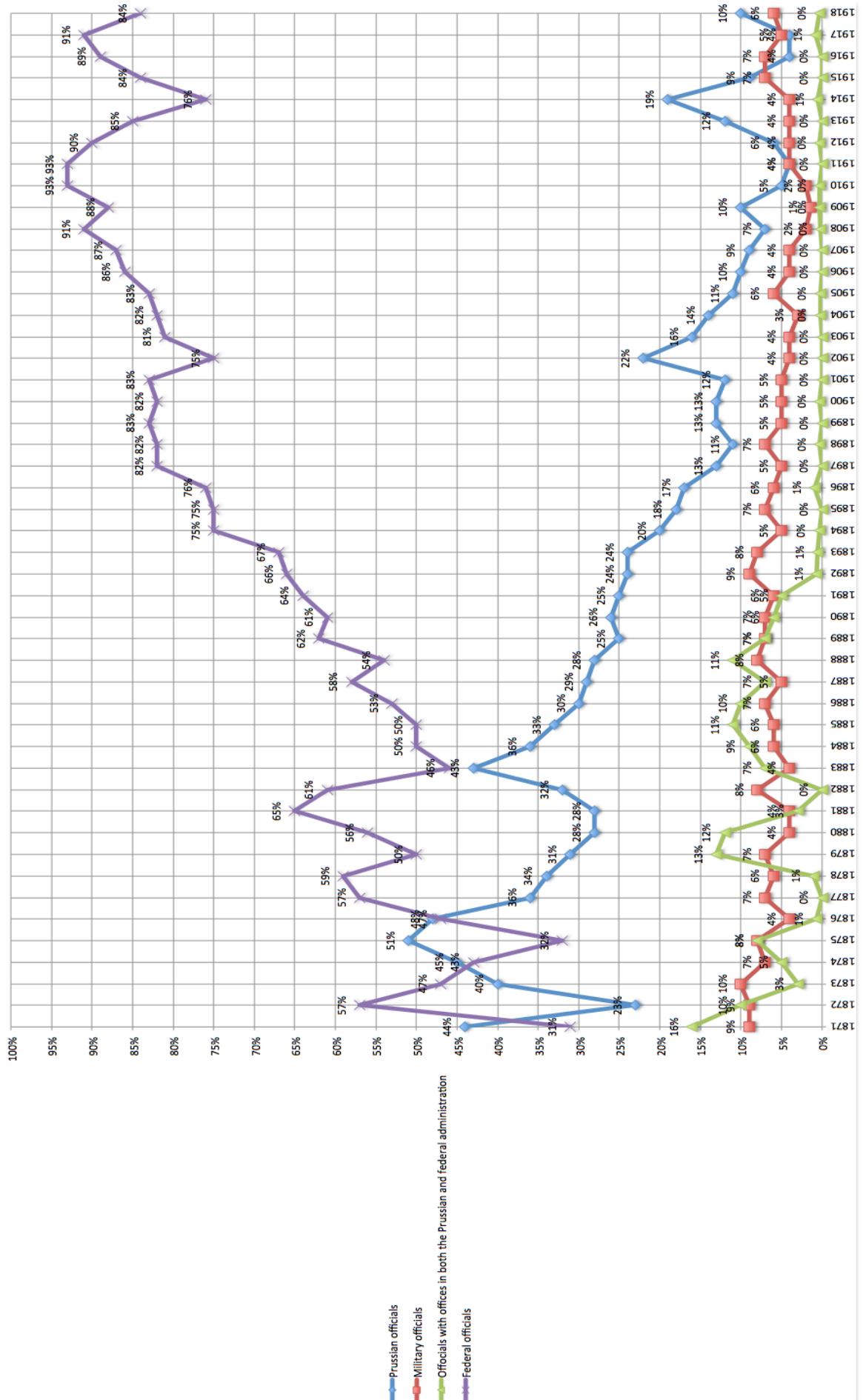


Figure 12: Attendance of Members of the Prussian State Ministry on the Prussian Bench, 1871-1918

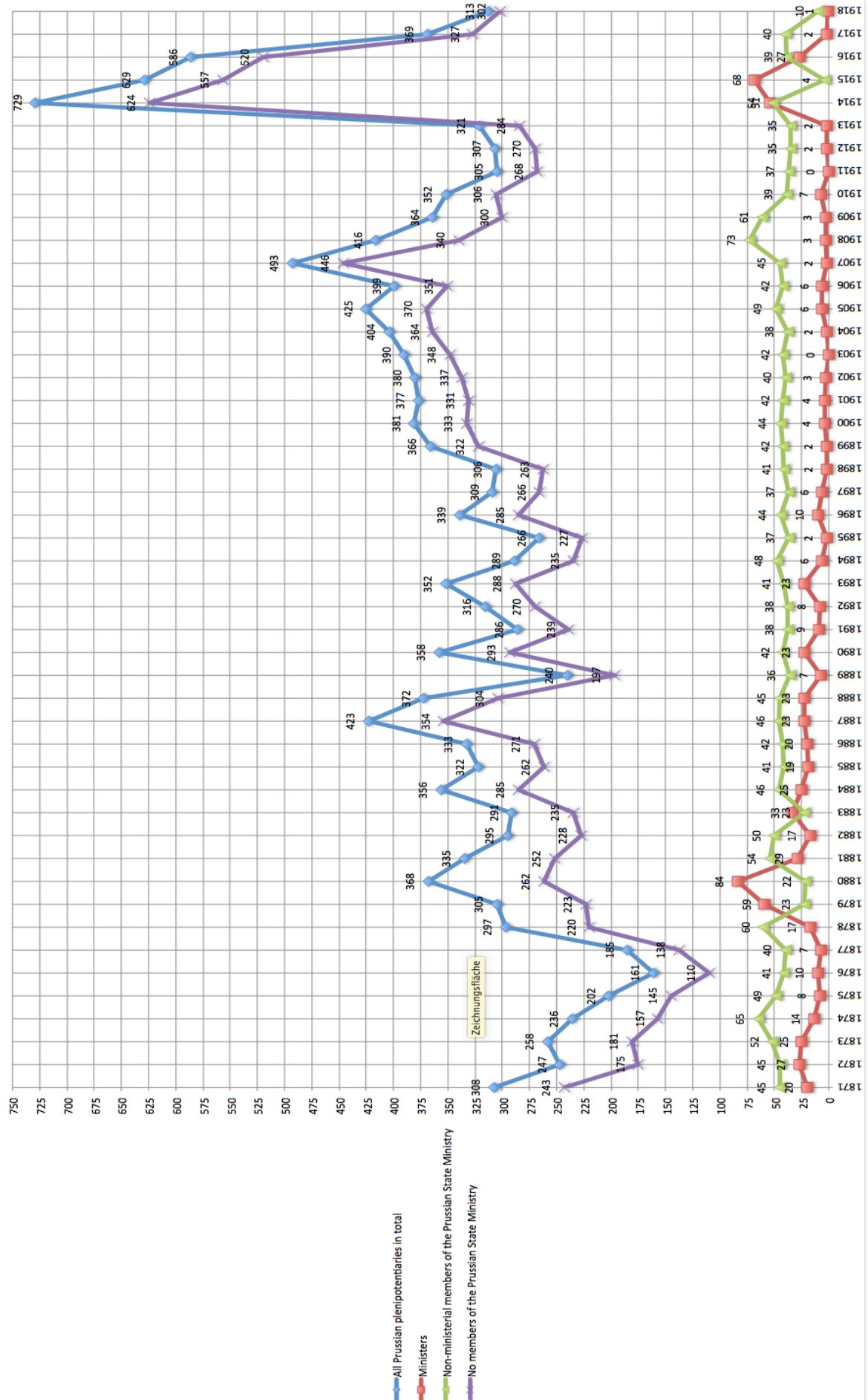


Figure 13: Participation of the Small States (excluding Waldeck-Pyrmont) in the Bundesrat (Total Numbers), 1871-1918

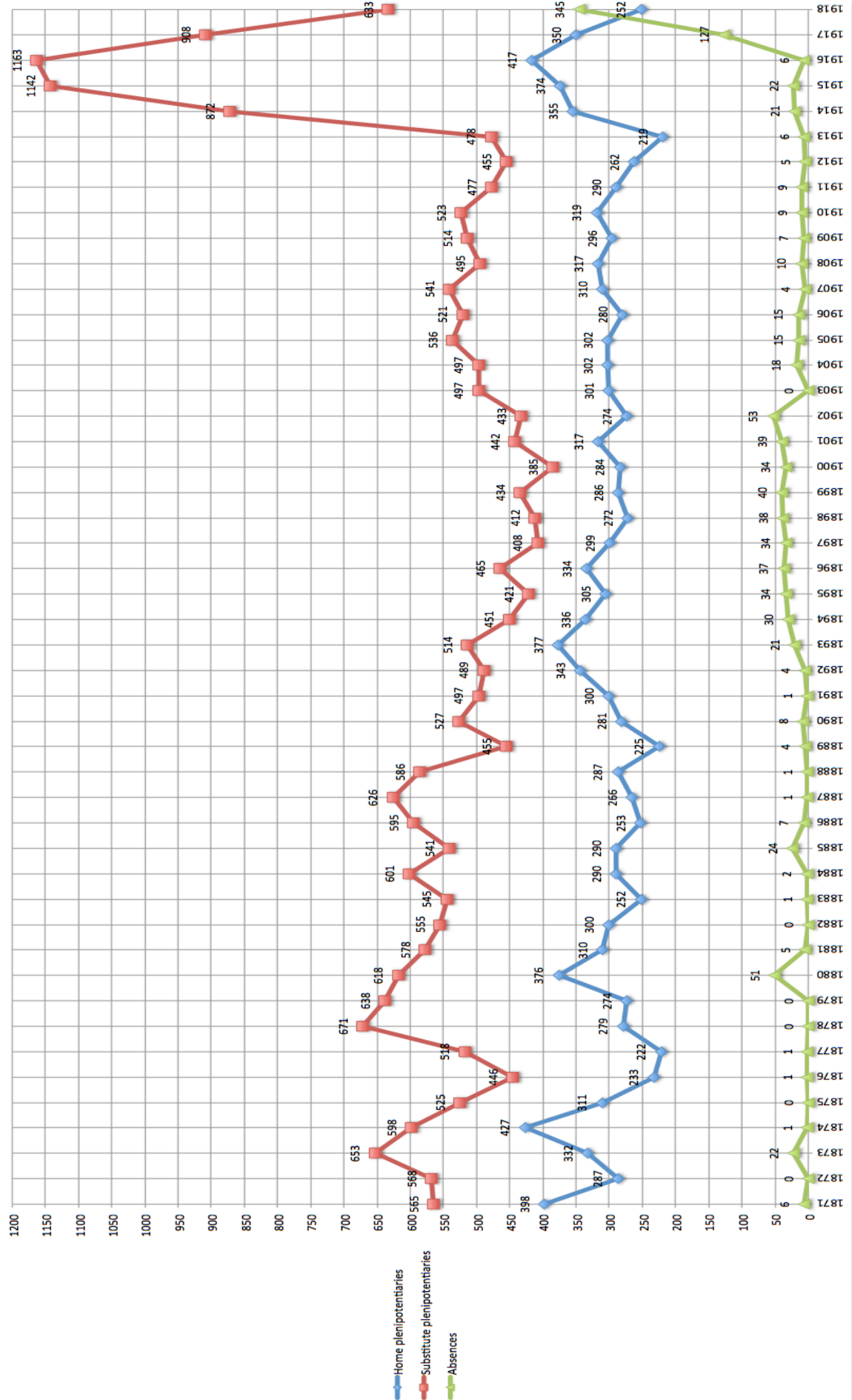


Figure 14: Participation of the Small States (excluding Waldeck-Pyrmont) in the Bundesrat (Per Cent), 1871-1918

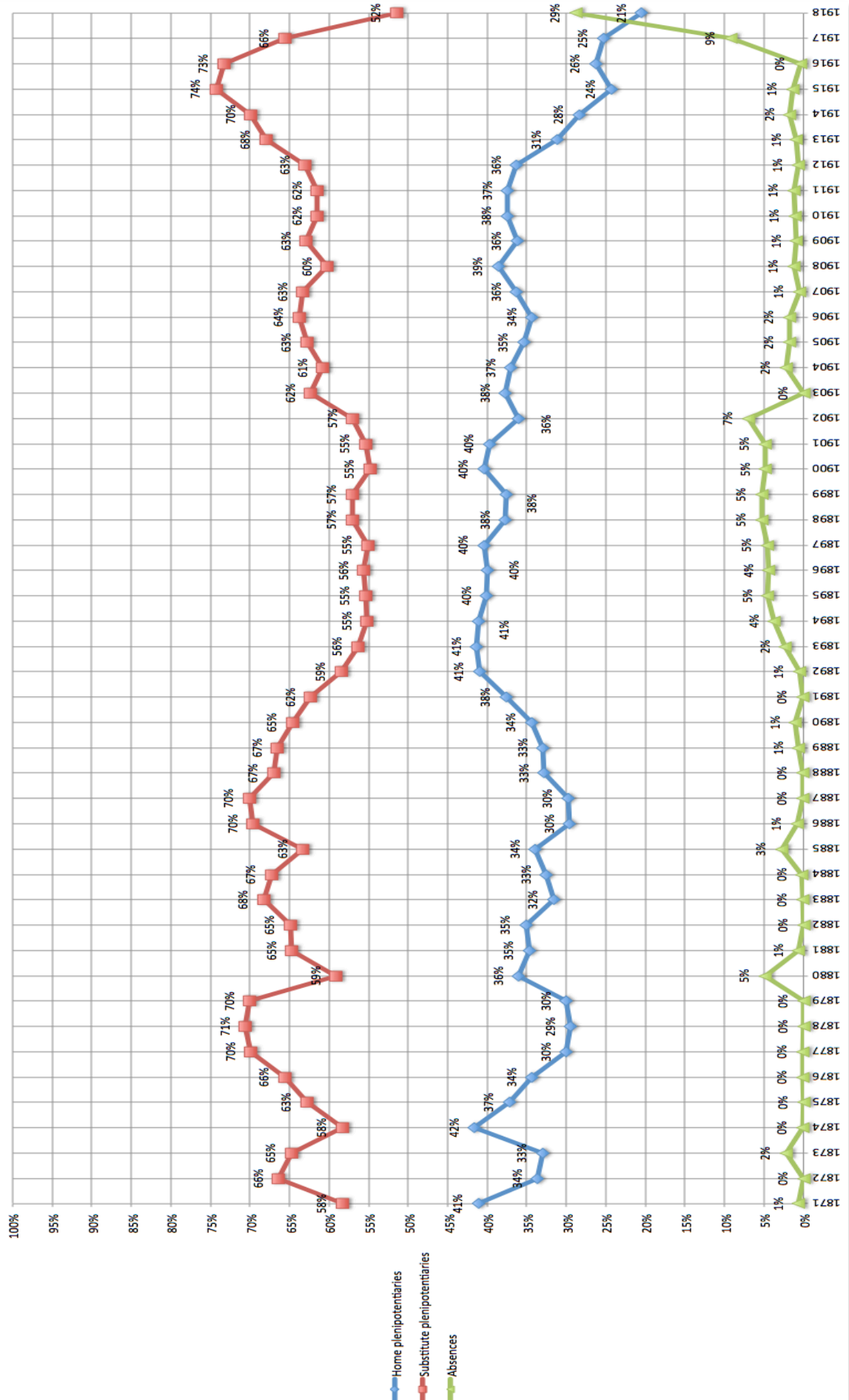


Figure 15: Registration Status of the Substitute Plenipotentiaries of the Small States (excluding Waldeck Pyrmont) in Per Cent, 1871-1918

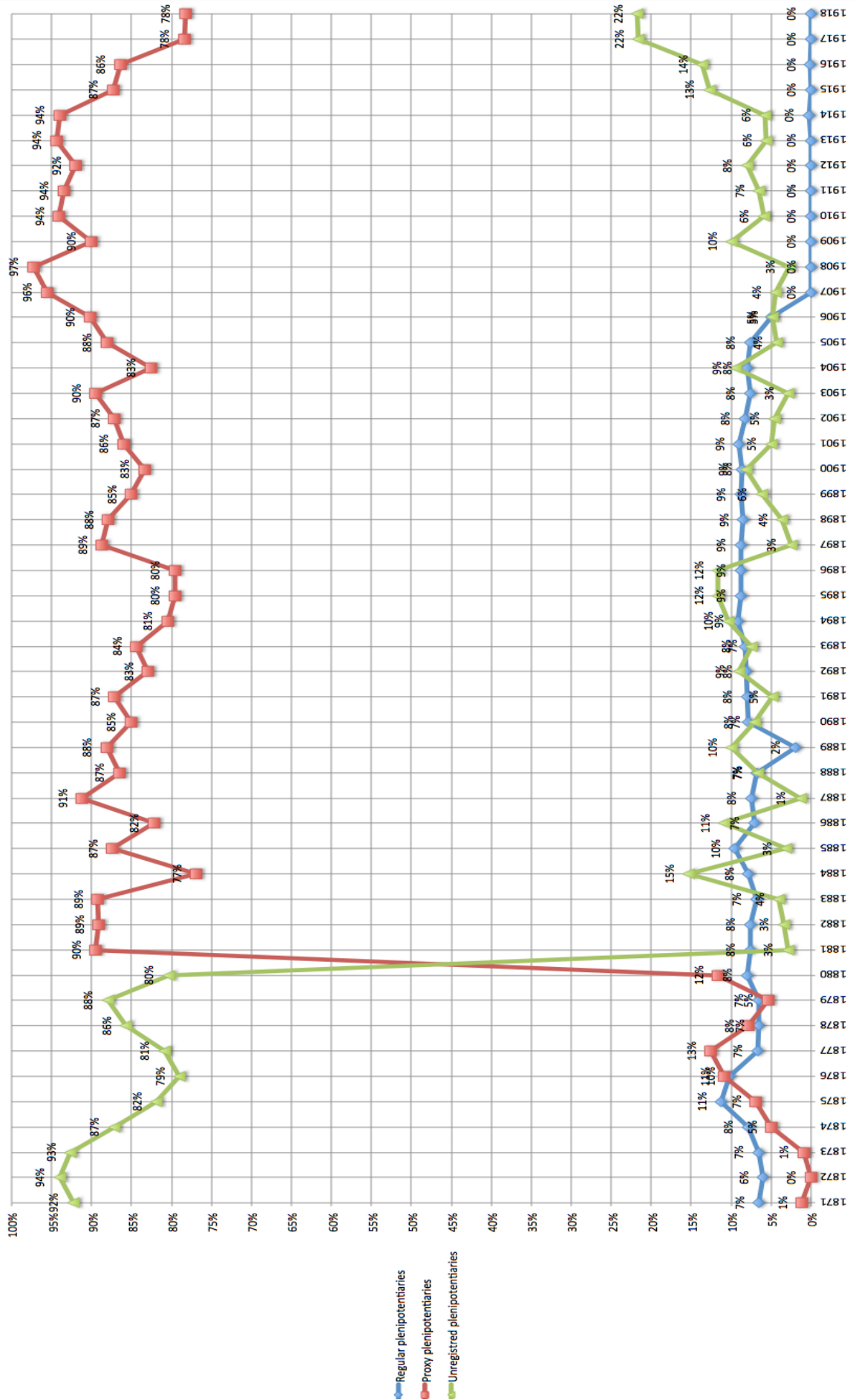


Figure 16: Participation of Waldeck-Pyrmont in the Bundesrat (Per Cent), 1871-1918

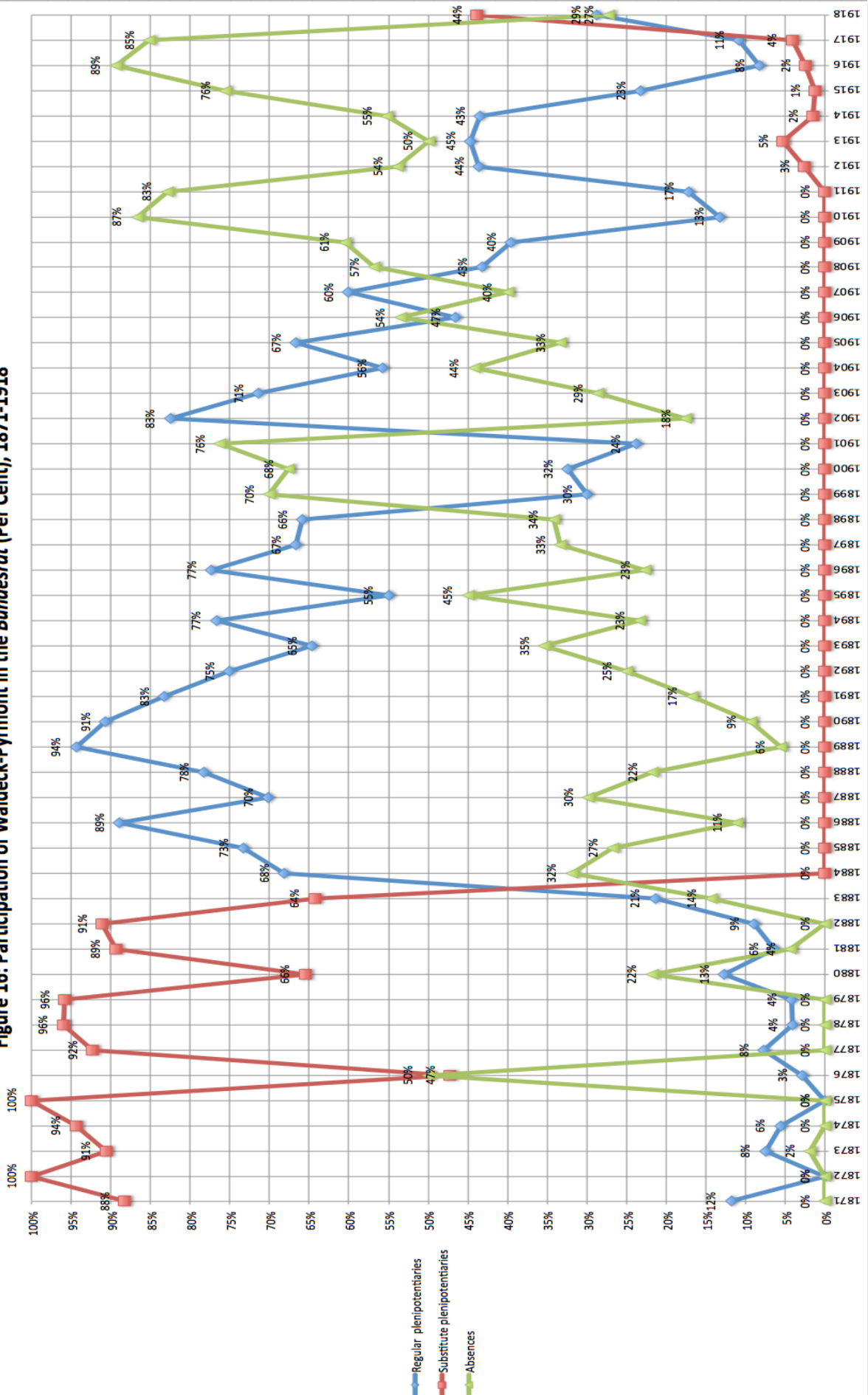


Table 4: Main Substitutions among the Small States, 1871-1918

Note: The most important substitute plenipotentiaries and the states they came from are given in parenthesis.

| States that were usually represented by their own plenipotentiaries | States that changed from using substitute plenipotentiaries to instructing their own plenipotentiaries or vice versa | States that were usually substituted by other states |
|---|---|--|
| Hesse | Saxe-Weimar-Eisenach (Hesse: 1871-1872 Karl Hofmann, 1873 Karl Neidhardt; Saxony: 1874-1876 Oswald von Nostitz Wallwitz, 1877 Karl von Planitz, 1878-1880 Oswald von Nostitz Wallwitz) | Mecklenburg-Strelitz (Mecklenburg-Schwerin: 1871-1875 Alexander von Bülow, 1875-1888 Max von Prollius, 1890-1906 Wilhelm von Oertzen, 1907-1918 Joachim von Brandenstein) |
| Mecklenburg-Schwerin | Saxe-Coburg-Gotha (Hesse: 1871-1872 Karl Hofmann, 1873-1879 Karl Neidhardt; Saxe-Weimar-Eisenach: 1880-1890 Adolf Heerwart) | Saxe-Meiningen (Hesse: 1871-1872 Karl Hofmann, 1873-1879 Karl Neidhardt; Bavaria: 1881-1884 Ferdinand von Raesfeldt, 1885-1903 Hermann von Stengel, 1904-1909 Wilhelm von Burkhard, 1910-1918 Wilhelm von Ritter) |
| Brunswick | Oldenburg (Brunswick: 1871-1885 Friedrich von Liebe, 1914-1916 Johannes Boden) | Saxe-Altenburg (Hesse: 1871-1872 Karl Hofmann, 1873-1879 Karl Neidhardt; Saxe-Weimar-Eisenach: 1880-1899 Adolf Heerwart, 1900-1907 Arnold Paulsen, 1908-1912 Karl Nebe, 1913-1918 Arnold Paulsen) |
| Lübeck | | Schwarzburg-Sondershausen (Hesse: 1871-1879 Karl Neidhardt; Saxe-Weimar-Eisenach: 1880-1899 Adolf Heerwart, 1900-1907 Arnold Paulsen, 1908-1912 Karl Nebe, 1913-1918 Arnold Paulsen) |
| | | Schwarzburg-Rudolstadt (Hesse: 1871 Karl Neidhardt, 1872 Karl Hofmann; Brunswick: 1873-1885 Friedrich von Liebe; Saxe-Weimar-Eisenach: 1885-1899 Adolf Heerwart, 1900-1907 Arnold Paulsen, 1908-1912 Karl Nebe, 1913-1918 Arnold Paulsen) |
| | | Reuß Senior Line (Hesse: 1871-1872 Karl Hofmann, 1873-1876 Karl Neidhardt; Mecklenburg-Schwerin: 1877-1888 Max von Prollius 1889 Karl Oldenburg 1890-1893 Wilhelm von Oertzen; Saxe-Weimar-Eisenach: 1903-1907 Arnold Paulsen, 1908-1912 Karl Nebe, 1913-1918 Arnold Paulsen) |

| | | |
|--|--|--|
| | | <p>Reuß Junior Line (Hesse: 1871-1872 Karl Hofmann, 1873-1874 Karl Neidhardt; Saxe-Altenburg: 1875 William Schlippe; Hesse: 1876-1879 Karl Neidhardt; Saxe-Weimar-Eisenach: 1880-1899 Adolf Heerwart, 1900-1907 Arnold Paulsen, 1908-1912 Karl Nebe, 1913-1918 Arnold Paulsen)</p> |
| | | <p>Anhalt (Brunswick: 1871-1885 Friedrich von Liebe, 1887-1905 Christian Cramm auf Burgdorf; Oldenburg: 1906-1914 Georg von Eucken- Addenhausen; Brunswick: 1914-1918 Johannes Boden)</p> |
| | | <p>Schaumburg-Lippe (Brunswick: 1871-1885 Friedrich von Liebe; Mecklenburg-Schwerin: 1885-1888 Max von Prollius; Hesse: 1889-1908 Karl Neidhardt; Oldenburg: 1909-1914 Georg von Eucken- Addenhausen; Brunswick: 1915-1916 Johannes Boden; Oldenburg: 1917-1918 Georg von Eucken- Addenhausen)</p> |
| | | <p>Lippe (Brunswick: 1871-1885 Friedrich von Liebe; Hesse: 1885-1908 Karl Neidhardt; Oldenburg: 1909-1914 Georg von Eucken- Addenhausen; Brunswick: 1915-1916 Johannes Boden; Oldenburg: 1917-1918 Georg von Eucken- Addenhausen)</p> |
| | | <p>Bremen (Lübeck: 1871-1894 Daniel Krüger, 1895-1913 Karl Klügmann, 1914-1918 Karl Sieveking)</p> |
| | | <p>Hamburg (Lübeck: 1871-1894 Daniel Krüger, 1895-1913 Karl Klügmann, 1914-1918 Karl Sieveking)</p> |

CHAPTER V CONFLICT

If [...] a court were entitled to decide [...] whether or not the constitution has been violated, then the competence of the legislator would be conferred upon the judge. He would be entitled to interpret the constitution in good faith and to supplement it in substance. Even though I cherish the Prussian judge as a juristic authority, the government does not believe that [...] the political future of the country, the distribution of power between the crown and the parliament as well as between the two chambers of the parliament should be made dependent on the verdict of a court.¹

When he made these remarks in the Prussian House of Representatives in 1863, Bismarck was determined to prevent the ongoing budget crisis from being taken to court. Although the conflict between the parliament and the crown over the reform of the army threatened to bring the machinery of Prussian government to a standstill, the new prime minister was unwilling to become embroiled in legal proceedings that could potentially expand parliamentary rights at the expense of the monarchy.² Bismarck stuck to this principled objection to a judicial umpireship throughout his political career. During and after the process of unification, he vehemently opposed the creation of a national constitutional court. In the struggle between parliamentary and political power, constitutional questions, Bismarck believed, were political rather than legal issues, in which no court should intervene – too great was the risk that such an institution might favour the introduction of parliamentary government, especially considering that most constitutional jurists held liberal political views.

¹ [‘Wenn [...] ein Gericht berufen würde, [...] die Frage zu entscheiden: Ist die Verfassung verletzt oder ist sie es nicht? So wäre damit dem Richter zugleich die Befugnis des Gesetzgebers zugewiesen; er wäre berufen, die Verfassung authentisch zu interpretieren oder materiell zu vervollständigen. So hoch ich auch den preußischen Richter als juristische Autorität stelle, so hat doch die Regierung nicht geglaubt, daß von dem einzelnen Urtheilsspruche eines Gerichts [...] die politische Zukunft des Landes, die Machtverteilung zwischen Krone und dem Landtag sowie zwischen den Häusern des Landtags abhängig gemacht werden dürfe.’] Bismarck in the Prussian House of Representatives, 22 April 1863, printed in Horst Kohl, ed., *Die Politischen Reden des Fürsten Bismarck*, vol. 2: 1862-1865, 14 vols (Stuttgart: Cotta, 1892), p. 172.

² See Dian Schefold, ‘Verfassung als Kompromiß? Deutung und Bedeutung des preußischen Verfassungskonflikts’, *Zeitschrift für Neuere Rechtsgeschichte* 3 (1981): 137–57. On the Prussian budget crisis and its constitutional dimension more generally, see also Winfried Becker, ‘Die angebliche Lücke der Gesetzgebung im preußischen Verfassungskonflikt’, *Historisches Jahrbuch* 100 (1980): 257–85 and Hans-Christof Kraus, ‘Ursprung und Genese der Lückentheorie im preußischen Verfassungskonflikt’, *Der Staat* 29, no. 2 (1990): 209–34.

But he also rejected the establishment of a German constitutional court for more personal reasons. ‘As the creator of the constitution’, the Bavarian diplomat Hugo Graf von und zu Lerchenfeld-Koefering pointed out, Bismarck ‘considered only himself competent enough to interpret it’.³

Due to Bismarck’s opposition, the Empire did not have a constitutional court. Even though the name suggests otherwise, the Imperial Court or *Reichsgericht* did not have this status. It was merely the supreme criminal and civil court of the Empire, which a reform of the legal system established in 1879.⁴ The fact that the federal constitution did not establish a constitutional court was very unusual. Most of the constitutions that were adopted across Europe after the 1848 revolutions created such a body.⁵ The constitutional draft of the Frankfurt Assembly had made arrangements for a particularly strong constitutional court.⁶ Even the Prussian constitution included provisions about the establishment of such an institution, which were, however, never put into practice.⁷ In the two other great federal states of the nineteenth century, the United States and Switzerland, supreme courts played a central role in national policy-making. The introduction of the Swiss *Bundesgericht* was one of the key measures of the revision of the constitution in the 1870s.⁸

³ [‘als Schöpfer der Verfassung betrachtete sich Fürst Bismarck auch als den allein kompetenten Ausleger’] Quoted in Binder, *Reich*, p. 135. See also Bismarck’s remarks in the Prussian State Ministry, 2 March 1890, protocol printed in Hans Fenske, ed., *Quellen zur deutschen Innenpolitik 1890-1914*, Quellen zum politischen Denken der Deutschen im 19. und 20. Jahrhundert. Freiherr vom Stein-Gedächtnisausgabe 25 (Darmstadt: WBG, 1991), no. 140, p. 457.

⁴ *Gerichtsverfassungsgesetz*, 27 January 1877, RGBl. (1877), no. 4, pp. 41-76, especially section IX *Reichsgericht*, §§ 125-41. See also *Einführungsgesetz zum Gerichtsverfassungsgesetze*, 27 January 1877, RGBl. (1877), no. 4, pp. 77-80. On the Imperial Court, see for example Kai Müller, *Der Hüter des Rechts: die Stellung des Reichsgerichts im Deutschen Kaiserreich 1879 - 1918* (Baden-Baden: Nomos, 1997) and Bernd-Rüdiger Kern and Adrian Schmidt-Recla, eds., *125 Jahre Reichsgericht*, Schriften zur Rechtsgeschichte 126 (Berlin: Duncker & Humblot, 2006).

⁵ See for example Constitution of the French Second Republic, 4 November 1848, art. 91-100; Austrian Constitution, 4 March 1849, section XIII ‘Von dem Reichsgerichte’, §§ 106f., which referred closely to the Austrian Krenschauer Draft, July 1848-March 1849, § 140; Danish *Junigrundloven*, 5 June 1849, §§ 72f.; Italian *Statuto Albertino*, 4 March 1848, art. 36, which determined that the senate could act as a constitutional court.

⁶ FC (1849), section V ‘Das Reichsgericht’, §§ 125-129.

⁷ Prussian Constitution, 31 January 1850, art. 61, 92, 116. These provisions were taken over from the imposed constitution of 5 December 1848, art. 59, 91.

⁸ On the American Supreme Court in the nineteenth century, see the brief essay by former Chief Justice William Rehnquist, ‘The Supreme Court in the Nineteenth Century’, *Journal of Supreme Court History* 27 (2002): 1-13 and the comprehensive study by Robert G. McCloskey and Sanford Levinson, *The American Supreme Court*, 4th ed. (Chicago: University of Chicago Press, 2004), chapters 3-5. On the Swiss Supreme

In the absence of a constitutional court, how were conflicts between the states, different levels of government, and the federal constitutional organs resolved in Imperial Germany? What system of conflict resolution emerged over the years? And what impact did it have on the evolution of the federal state? These issues have received almost no attention in historical scholarship. The two most relevant publications are two legal historical studies that consider the normative evolution of a customary system of constitutional jurisdiction.⁹ The political motivations behind this development have not been examined at all.

There seem to be two reasons for this neglect. On the one hand, we are so used to associating the settlement of constitutional disputes in federal states with a supreme court that it is easy to overlook alternative mechanisms. On the other hand, there is a specific methodological problem. The subject matter is by its nature dispersed across a great number of cases; there was no single institutional location and no single process through which conflicts within the federal system were resolved. And in order to make sense of the structures and mechanisms that evolved over the years, focussing on just one constitutional crisis – even if it was of special importance – is not enough. Rather, we have to analyse a wide range of individual, often very small cases that took place at all levels of government and comprised no less than six different types of conflict: conflicts between different states; conflicts within states; conflicts between the national level and the states; succession conflicts; conflicts between the federal constitutional organs; and conflicts regarding the constitutionality of laws.¹⁰

Moreover, for a full understanding of the problem, an analysis of legal proceedings alone will scarcely suffice. Rather, we have to adopt a broader perspective that also brings into view

Court in the nineteenth century, see Alfred Kölz, *Neuere Schweizerische Verfassungsgeschichte. Ihre Grundlinien in Bund und Kantonen seit 1848* (Bern: Stämpfli, 2004), pp. 575-80.

⁹ Björner, *Verfassungsgerichtsbarkeit* and Bönnemann, *Verfassungskonflikte*.

¹⁰ This chapter will not consider issues relating to refusal of justice [*Justizverweigerung*], because throughout the imperial era it happened not a single time that a state denied a citizen judicial aid. Had this happened, the *Bundesrat* would have been obliged to force the state government concerned to provide judicial aid, see RV (1871), art. 77. It is worth noting that due to the lack of a basic rights catalogue, this provision was the only direct form of legal protection that the federal constitution provided to German citizens. On refusal of justice, see Bönnemann, *Verfassungskonflikte*, pp. 134-8.

those disputes that – even though they caused great trouble – were never addressed by legal channels, such as the permanent conflict over a modernisation of the Prussian electoral law. Analysing such cases shows us under what conditions constitutional actors refrained from initiating formal proceedings, an insight that is important in fully understanding how federal structures were manipulated in the fight between monarchical and parliamentary power. An unwelcome, though unavoidable, feature of this approach is that it makes the number of disputes we have to consider even bigger. It is only possible to examine all relevant cases because we can draw on a rich body of literature focusing on individual conflicts. One of the main tasks of this chapter is to infer from these specialised studies the overall framework of conflict resolution and its impact on federal evolution.

But before we can survey real cases, it is necessary to be clear about the structural framework that the federal constitution established. To this end, this chapter will first examine the relevant constitutional provisions and their underlying principles. Through an analysis of the views of the Prussian government in the constitutive *Reichstag* and of the commentaries by constitutional lawyers, this opening section will show that the constitution set up a number of elaborate safety measures that were intended to protect monarchical power in situations of conflict. After that, this chapter will turn to concrete disputes, exposing the different mechanisms of conflict resolution that evolved over time. This second section will demonstrate that for a wide range of issues the Imperial Court developed into a customary constitutional court. All matters that concerned important questions of power, however, continued to be resolved by political rather than legal channels, in particular conflicts about the competences of the different constitutional organs and the constitutionality of laws.

Over the course of this chapter, it will become clear that in the imperial federal state legal mechanisms of conflict resolution were largely replaced by political negotiations, deals, and threats. In the context of the struggle between monarchical and parliamentary interests, even minor legal disputes could thus easily turn into issues of power. Over time, this politicisation

of legal issues undermined the constitution to the point where it no longer provided a stable framework of rules and procedures that could guarantee the federal nature of the union. The lack of a well-defined system of conflict resolution was thus an important factor in the gradual implosion of the federal order.

Safety Measures

The central judicial organ of the constitution was the *Bundesrat*. While it had to resolve conflicts between the national level and the states in cooperation with the Emperor, it could decide disputes between different states and within states on its own.¹¹ To a certain degree, the council of princely governments thus resembled a constitutional court.

This status was no coincidence, but a safety measure for the protection of monarchical power. When the constitutive *Reichstag* debated the adoption of the relevant provisions in April 1867, the commissioner of the Prussian government, Karl Friedrich von Savigny, outlined the rationale behind them. The constitution did not establish a constitutional court, he made clear, out of respect for the sovereignty of the princes who rejected the idea of a central judicial body that could intervene in their sovereign affairs. In its own right, this argument could hardly convince the liberal majority of MPs, because they desired a centralised state with a powerful parliament and strong judicial institutions. The Prussian diplomat, son of the famous legal scholar Friedrich Carl von Savigny, therefore invoked the fear that history might repeat itself. During the 1848 revolutions and their aftermath, he warned, attempts to create a pan-German constitution had failed not least because they had disregarded the scepticism of the princes against a national constitutional court. The Prussian government had learned from this experience, he declared, and no longer supported the foundation of such an institution.¹²

¹¹ RV (1871), art. 7, 17, 19.

¹² *Stenographische Berichte (NDB)*, 1867, session 31, 9 April, pp. 664-6.

It was a result of this view that the federal constitution – instead of referring to the constitutional drafts of the Frankfurt Assembly and the Erfurt Union – took over the judicial model of the German Confederation. Just like the Vienna Final Act, the 1871 constitution conferred the general competence for dealing with constitutional conflicts upon the congress of princely envoys.¹³ According to the constitutional historian Ernst-Rudolf Huber, the reason for this arrangement was rather simple: in a monarchical union, this body was the only institution that had sufficient authority to settle disputes between princely governments.¹⁴

But this was not the whole truth behind the arrangements of the constitution, because otherwise the *Bundesrat* would not have enjoyed even more judicial powers than the old *Bundestag*. While the latter had been obliged to refer conflicts that it had failed to mediate to special arbitration courts, the former had the option of handing down a verdict on its own.¹⁵ As the Prussian bench dominated the *Bundesrat*, this expansion of power buttressed Prussia's hegemony over the union. From this perspective, the real motivation behind the judicial status of the *Bundesrat* was an increase of Prussian control.

The problem was, however, that the Prussian government benefitted from the powers of the council only for as long as it had control over its *Bundesrat* delegation. As we saw in the previous chapter, the emerging federal administration took over the Prussian bench and came to dominate the *Bundesrat* within a decade after unification. In the end, it was therefore the federal rather than Prussian executive that could take advantage of the judicial powers of the *Bundesrat*, because the council became an instrument of the Reich against the states, including Prussia.

Nonetheless, the judicial functions of the *Bundesrat* worked as a safeguard of monarchical power. Some observers, such as the liberal constitutional lawyer and 1848 veteran Robert von Mohl, complained that the nature of the council as the main executive and legislative organ of

¹³ WSA (1820), art. 19-24.

¹⁴ Huber, *Verfassungsgeschichte*, vol. 3, p. 1066.

¹⁵ On the arbitration system of the German Confederation, the so-called *Austrägelgerichtsbarkeit*, and its relation to the judicial provisions of the 1871 constitution, see Björner, *Verfassungsgerichtsbarkeit*, pp. 36-8.

the monarchical governments implied that it would decide constitutional disputes on the basis of political interests rather than legal rules.¹⁶ To such criticism, Savigny replied by pointing – much as Bismarck had during the Prussian budget crisis – to the political nature of constitutional questions: ‘[A court] would decide above all in accordance with juristic principles and [...] aspects; [...] but we believe that questions eminently political in nature are better dealt with as their nature requires [...] it.’¹⁷

Most MPs shared this view. The protocol of the *Reichstag* notes that the assembly acknowledged Savigny’s statement with a loud ‘Bravo!’.¹⁸ At first sight, this approval seems odd, because the judicial functions of the *Bundesrat* were above all in the interest of the monarchical governments. But in some areas, the conflict resolution procedures of the constitution granted the *Reichstag* a greater preponderance of influence than a court-based system would have done. This was true, in particular, for constitutional conflicts within states. If a state lacked adequate judicial institutions, such a dispute was first referred to the *Bundesrat* for mediation. But if the council failed to bring about an agreement, the matter had to be settled by way of federal legislation.¹⁹ As Savigny noted, this provision gave the *Reichstag* a pivotal position, because without its approval no law could enter into force.²⁰

This context makes it easier to understand why the constitutive *Reichstag* did not make more serious efforts to introduce a constitutional court; and also why the parliamentarians did not insist on creating any official procedure for the resolution of conflicts between the federal constitutional organs. Just like the monarchical governments, they preferred conflicts between the *Reichstag*, Chancellor, Emperor, and *Bundesrat* to be resolved by political compromises

¹⁶ Robert von Mohl, *Das deutsche Reichsstaatsrecht. Rechtliche und politische Erörterungen* (Tübingen: Laupp, 1873), p. 69.

¹⁷ [‘[Ein Gericht würde] jedenfalls denn doch vorzugsweise bloß nach rein juristischen Grundsätzen und [...] Gesichtspunkte entscheiden. [...] wir glauben aber, daß Fragen von eminent politischer Natur weit besser so behandelt werden, wie es ihre Natur erheischt und [...] indicirt.’] *Stenographische Berichte (NDB)*, 1867, session 31, 9 April, pp. 665f.

¹⁸ *Ibid.*, p. 666.

¹⁹ RV (1871), art. 76.2.

²⁰ *Stenographische Berichte (NDB)*, 1867, session 31, 9 April, p. 665.

rather than by legal proceedings – not least because they hoped that the federal parliament would become more powerful over time.

Such a system, in which political rather than judicial bodies dealt with the resolution of conflicts, was incompatible with the rule of law. As the Leipzig professor Karl Binding pointed out, decisions of the *Bundesrat* lacked ‘all guarantees of a fair judgement’. Any measure that the council adopted could not be revoked. It was not possible to lodge an appeal. Moreover, the plenipotentiaries of the state governments were anything but impartial judges.²¹

This lack of neutrality was particularly problematic in conflicts between the Reich and the states, because for such disputes the constitution provided much more powerful instruments of law enforcement than for any other type of conflict: the powers to monitor the implementation of laws and to impose a federal intervention, which were known as *Reichsaufsicht* and *Reichsexekution*, respectively. All laws, regardless of whether they had been adopted at the national or state level, had to be implemented by the states. In order to guarantee some degree of homogeneity, the constitution gave the Emperor the right to monitor the implementation of laws, a right that he delegated to special federal officials, the so-called *Reichskontrollbeamte*.²² If they noticed deficiencies, the *Bundesrat* could determine what countermeasures the Emperor had to take.²³ The severest sanction that could be imposed on a state that failed to fulfil its obligations was a federal intervention. As a measure of last resort, this punishment could comprise any action necessary to ensure compliance, including military force.²⁴

²¹ [‘alle Garantien gerechten Urteils’] Karl Binding, ‘Bundesrat und Staatsgerichtshof’, *Deutsche Juristen-Zeitung* 4 (1899), pp. 71-4, quote on p. 73.

²² RV (1871), art. 17.

²³ Ibid., art. 7.

²⁴ Ibid., art. 19.

Rather than on a court decision, this process of law enforcement depended on a decree by the council of monarchical governments.²⁵ In a federal system shaped by princely solidarity, the powers of *Reichsaufsicht* and *Reichsexekution* were therefore a tool against over-demanding parliaments and other liberal tendencies that threatened the status of the states as strongholds of monarchical power.

In order fully to comprehend this function, we have to look at the relevant mechanisms more closely. There were two different types of *Reichsaufsicht*. The Emperor and *Bundesrat* had the right to monitor the implementation of laws not only in fields that were regulated by federal legislation, but – most lawyers agreed – also in areas that were not.²⁶ The difference between this so-called dependent and independent *Reichsaufsicht* was the basis on which the two federal organs could take action. In the case of the former, they checked whether state policies conformed to concrete rules that were laid down in pieces of legislation. In the case of the latter, in contrast, they did not primarily consider whether a state violated the law, but whether it acted against national interests. As Heinrich Triepel, one of the most important German constitutional and international lawyers of the late nineteenth and early twentieth century, put it in his standard work on *Reichsaufsicht*:

The Reich makes sure that the states do what is necessary for certain purposes and that they refrain from doing anything that is incompatible with these purposes. In this process, the Reich is not only interested in the legality, but also in the “adequacy” of state behaviour [, meaning in the]

²⁵ On this issue, see Huber, *Verfassungsgeschichte*, vol. 3, pp. 1028f., 1032f.

²⁶ See for example Albert Hänel, *Deutsches Staatsrecht. Die Grundlagen des deutschen Staates und die Reichsgewalt*, vol. 1, 2 vols, Systematisches Handbuch der deutschen Rechtswissenschaft, 5.1 (Leipzig: Duncker & Humblot, 1892), pp. 305ff.; Paul Laband, *Das Staatsrecht des Deutschen Reiches*, 5th ed., vol. 1, 4 vols (Tübingen: Mohr, 1911), p. 109; Georg Meyer, *Lehrbuch des Deutschen Staatsrechts*, ed. Gerhard Anschütz, 7th ed. (Leipzig & Munich: Duncker & Humblot, 1919), pp. 939f.; Max von Seydel, *Commentar zur Verfassungsurkunde für das Deutsche Reich*, 2nd ed. (Freiburg: Mohr Siebeck, 1897), p. 59; Heinrich Triepel, *Die Reichsaufsicht. Untersuchungen zum Staatsrecht des Deutschen Reiches*. (Berlin: Springer, 1917), pp. 435f.; Philipp Zorn, *Das Staatsrecht des Deutschen Reiches*, 2., vol. 1: Das Verfassungsrecht, 2 vols, Guttentag'sche Sammlung von Lehrbüchern des Deutschen Reichsrechtes 5 (Berlin: Guttentag, 1895), p. 427. The only major legal scholar who disagreed was Ludwig Dambitsch, *Die Verfassung des Deutschen Reichs mit Erläuterungen* (Berlin: Dahlen, 1910), pp. 104ff. On the two types of *Reichsaufsicht*, see Holste, *Bundesstaat*, pp. 231-6, where he analyses the writings of these lawyers.

fulfilment of the constitutional duty to respect the interests of the Reich or other common interests acknowledged by the constitution.²⁷

The constitution established this vague standard in the clause on federal intervention. According to this provision, the Reich was entitled to intervene in any state that did not observe its ‘constitutional duties towards the Federation’.²⁸ For obvious reasons, it was extremely problematic that the most powerful mechanisms for the coordination of national and state policies depended on the interpretation of national interest, political adequacy, and federal duties. The open-ended character of these concepts implied that the *Bundesrat* – if it really wanted to take action against a state – could easily find a pretext for an intervention. This potential for manipulation made the powers of *Reichsaufsicht* and *Reichsexekution* formidable instruments in the fight against an expansion of parliamentary power in the states. Any signs of a parliamentary takeover of government, large-scale civil unrest, or even a revolution would have provided plenty of reasons for punitive measures.²⁹

As the Prussian lawyer Paul Schilling pointed out, the character of the *Reichsexekution* as an instrument of monarchical power was further reinforced by the fact that the *Bundesrat* could, but did not have to, impose an intervention on a disobedient state.³⁰ According to this provision, then, it was perfectly legitimate for the council to only take action if an intervention served monarchical interests. Due to her hegemonic status in the union, this arrangement was particularly relevant in relation to Prussia. As the right to implement the decisions of the *Bundesrat* fell to the Emperor, meaning to the Prussian king, a federal intervention against the Prussian government was practically impossible. What the *Bundesrat*

²⁷ [‘Das Reich wacht darüber, daß die Einzelstaaten das im Dienste gewisser Zwecke Notwendige tun, das mit diesen Zwecken Unverträgliche unterlassen. Sein Absehen ist also hier niemals auf bloße Legalität, sondern auf die „Zweckmäßigkeit“ des gliedstaatlichen Verhaltens gerichtet, [d. h. auf] die Erfüllung der verfassungsmäßigen Bundespflicht, die Interessen des Reichs oder andere von der Reichsverfassung anerkannte Gemeininteressen zu achten’] Triepel, *Die Reichsaufsicht. Untersuchungen zum Staatsrecht des Deutschen Reiches*, pp. 450f.

²⁸ [‘verfassungsmäßige Bundespflichten’] RV (1871), art. 19.

²⁹ See Huber, *Verfassungsgeschichte*, vol. 3, pp. 1034ff.

³⁰ Paul Schilling, ‘Die Reichsexekution’, *Archiv für öffentliches Recht* 20 (1906), pp. 65f.

could do, however, was charge the Emperor with punishing the Prussian parliament.³¹ In the constitutive *Reichstag* of 1867, the liberal MP Arnold Kitz raised this problem, arguing that a manipulation of the intervention power must be prevented by changing the relevant provisions to the effect that the Prussian executive would be obliged to observe its federal duties as much as the other state governments.³² But most of his colleagues did not share Kitz' concerns, most probably because they agreed with Bismarck's view that 'one could start ringing the death-knell for the German Empire [...] should Prussia ever refrain from fulfilling her federal duties'.³³

The lack of any precise definition of the circumstances under which the *Bundesrat* could intervene in a state gave this power a preventive effect. Throughout the imperial era, it happened not a single time that a federal intervention was undertaken. In some respects, this absence of relevant incidents can be taken as evidence of the stability that the threat of intervention created in the states. But it is important to keep things in perspective. The *Bundesrat* certainly could not afford to impose an intervention as a sanction for any misbehaviour. Neither the princes nor the parliaments and the public would have tolerated such a decision. Schilling underlined this point from a juristic perspective. The constitutionally defined yardstick for an intervention – the violation of 'duties towards the Federation' – was so broad, he argued, precisely because this power was meant to be applied only in the most dangerous cases, meaning in conflicts that threatened to destroy the union.³⁴

As Schilling's observation shows, the crux of the matter was what the abstract concept of federal duties actually stood for. There was no uniform definition in the contemporary

³¹ See Triepel, *Die Reichsaufsicht. Untersuchungen zum Staatsrecht des Deutschen Reiches*, p. 682 and Hänel, *Deutsches Staatsrecht. Die Grundlagen des deutschen Staates und die Reichsgewalt*, vol. 1, p. 452, fn. 6. See also Holste, *Bundesstaat*, p. 237 and Huber, *Verfassungsgeschichte*, vol. 3, pp. 1032, 1042, where he calls Prussia's partial exemption from the provisions on federal intervention a 'genuine loophole of the constitution' ['echte Lücke in der Verfassung'].

³² Arnold Kitz in the constitutive *Reichstag*, session 20, 27 March 1867, printed in Bezold/Holtzendorff, *Materialien*, vol. 1, pp. 773f.

³³ ['Man müsste nun aber [...] gleich das Grabgeläute für das deutsche Reich ansagen, wenn Preußen seine Bundespflichten verweigern sollte.'] Bismarck in the *Reichstag*, as reported by Schilling, 'Die Reichsexekution', p. 85.

³⁴ Ibid., pp. 52f. On this issue, see also Huber, *Verfassungsgeschichte*, vol. 3, pp. 1034f.

political and legal debate. One of the few issues on which politicians and lawyers across all ideological camps agreed was that the federal duties of the states comprised not only the written provisions of the constitution, but also more general obligations toward the union that the constitution did not explicitly mention. These unwritten duties were usually summarised in the collective term *Bundestreue* or federal allegiance.³⁵

Moreover, most opinions held that federal allegiance embraced all principles that guaranteed a working relationship between the Reich and the states. By implication, a federal intervention was only justified if a state did serious harm to the fundamental organisation of the union. Paul Laband, celebrated law professor from Strasburg, outlined what such behaviour might entail:

[A state] can jeopardise the interests of the Reich [...] and thus violate its duty of allegiance, for example by disturbing the relations of the Reich to foreign countries or the peaceful relationships among the members of the union or by antagonising the basic direction of federal politics.³⁶

From interpretations such as this, Ernst-Rudolf Huber has derived three basic duties that defined federal allegiance: the preservation of peace in the union; the coordination of state with federal policies; and the preservation of order in the state territories. Among these duties, the last-mentioned is most interesting because it obliged the states to uphold the status quo, including the monarchical form of government, as a matter of federal allegiance. In other words, if there was an attempt to introduce parliamentary government in a state, the *Bundesrat* and the Emperor were allowed to intervene.³⁷

This consideration shows that *Bundestreue* played a central role in the protection of monarchical power. For precisely this reason, there was a rich discussion on this rather

³⁵ Rudolf Smend, 'Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat (1916)', in *Staatsrechtliche Abhandlungen und andere Aufsätze*, 3rd ed. (Berlin: Duncker & Humblot, 1994), p. 48. See also the analysis of *Bundestreue* by Holste, *Bundesstaat*, pp. 152-6, on which the following section is based.

³⁶ ['[Ein Staat] kann [...] durch sein Verhalten die Interessen des Reichs gefährden und dadurch gegen die Treueverpflichtung verstoßen; z.B. durch Störung der Beziehung des Reichs zu auswärtigen Staaten oder des friedlichen Verhältnisses unter den Bundesgliedern oder durch Entgegenwirken gegen die Tendenz der Reichspolitik'] Laband, *Das Staatsrecht des Deutschen Reiches*, vol. 1, p. 109.

³⁷ Huber, *Verfassungsgeschichte*, vol. 3, pp. 1036-8, 1034f.

abstract concept in both the political and intellectual arena. One can identify two basic views, which differed mainly in their understanding of who owed allegiance to whom (see Figure 17).

In keeping with their liberal, nation-state oriented perspective, most constitutional lawyers argued that the states owed allegiance to the Reich. This interpretation was based on their strictly hierarchical understanding of the federal state, which held that the states were subordinated to the national level.³⁸ For the lawyers, federal allegiance thus defined a one-sided relationship of submission (see Figure 17). Albert Hänel, law professor in Kiel and national liberal MP in the *Reichstag*, made clear that this kind of *Bundestreue* comprised two elements, namely:

the passive obedience of the states, which obliges them to do nothing and to refrain from anything that [...] contradicts objective federal law, [and] the commitment of the states to positive action, [meaning] to using their state authority in order to put the provisions of federal law into practice and to support the objectives that [federal law] wants to achieve.³⁹

According to this view, federal allegiance meant the ‘constitutional obedience’ of the states.⁴⁰ This interpretation was the logical expression of the liberal desires of most lawyers, because it strengthened the national level vis-à-vis the states and thus supported Germany’s centralisation that – as they rightly believed – would benefit the *Reichstag* and would eventually lead to the emergence of parliamentary government.⁴¹

³⁸ On the subordination of the states to the Reich, see Hänel, *Deutsches Staatsrecht. Die Grundlagen des deutschen Staates und die Reichsgewalt*, p. 805; Laband, *Das Staatsrecht des Deutschen Reiches*, vol. 1, 1911, p. 59; Hermann Schulze, *Lehrbuch des Deutschen Staatsrechtes*, vol. 1: Das Deutsche Landesstaatsrecht, 2 vols (Leipzig: Breitkopf & Härtel, 1881), p. 47; and Zorn, *Das Staatsrecht des Deutschen Reiches*, vol. 1, p. 137.

³⁹ [‘passiven Gehorsam der Einzelstaaten, der sie verpflichtet, nichts zu thun und alles zu unterlassen, was mit dem objektiven Reichsrecht [...] in Widerspruch steht [und die] Verpflichtung der Einzelstaaten zum positiven Handeln, zur Handhabung der Staatsgewalt, um die Vorschriften des Reichsrecht zur Anwendung zu bringen und die von demselben gewollten Erfolge zu erzielen’] Hänel, *Deutsches Staatsrecht. Die Grundlagen des deutschen Staates und die Reichsgewalt*, p. 305.

⁴⁰ Ibid., p. 446.

⁴¹ The book that will grow out of this thesis will open with a chapter on the development of the doctrinal debate about the federal state (see Introduction), which will analyse the political orientation of the lawyers in detail. On this issue, see also the standard work by Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2, 4 vols (Munich: Beck, 1992) and the study by Manfred Friedrich, *Geschichte der*

Since Bismarck and the monarchical governments wanted to prevent this scenario, they interpreted *Bundestreue* in just the opposite way. By referring to the unification treaties, they argued that federal allegiance had a contractual character. It was a special form of ‘sanctity of contract’ (*pacta sunt servanda*). As such, it defined an egalitarian relationship among the different members of the union rather than a one-sided submission of the states to the Reich (see Figure 17). Bismarck outlined this view in the constitutive *Reichstag* of 1867 when he replied to criticism of Prussia’s hegemony:

The basis of this union ought not to be force, either against the princes or against the people. [...] The basis ought to be the confidence in Prussia’s observance of the contracts, [...] and this confidence must not be shaken as long as the other states too observe the contracts.⁴²

As the unification treaties had been concluded by the monarchs, this view saw federal allegiance as a duty of the princes rather than states. *Bundestreue* was a form of princely solidarity. Referring to this understanding, Bismarck declared to the envoys of the state governments in 1885 that ‘the German Empire features a firm basis in the federal allegiance of the princes, which guarantees its future.’⁴³ In the Year of the Three Emperors, he underlined the importance of this interpretation in a letter to Prince William, who was about to ascend to the throne. The ‘security of the Reich and of its monarchical institutions’, the Chancellor argued, ‘lies in the “unity of the princes”’. These are ‘not subjects, but allies of the Emperor’, he pointed out, ‘and if we do not observe the treaties, they too will not feel obliged to do so’.⁴⁴

deutschen Staatsrechtswissenschaft, Schriften zur Verfassungsgeschichte 50 (Berlin: Duncker & Humblot, 1997).

⁴² [‘Die Basis dieses Verhältnisses soll nicht die Gewalt sein, weder den Fürsten noch dem Volke gegenüber. Die Basis soll das Vertrauen zu der Vertragstreue Preußens sein und dieses Vertrauen darf nicht erschüttert werden, so lange man uns die Vertragstreue halt.’] *Stenographische Berichte (NDB)*, 1867, session 10, 11 March, p. 136.

⁴³ [‘Das Deutsche Reich hat die feste Basis in der Bundestreue der Fürsten, in welcher seine Zukunft verbürgt ist.’] Quoted in Otto Mayer, ‘Republikanischer und monarchischer Bundesstaat’, *Archiv für öffentliches Recht* 18 (1903), p. 370.

⁴⁴ [‘Sicherheit des Reichs und seiner monarchischen Institutionen [liegt] in der „Einigkeit der Fürsten“], [‘nicht Unterthan, sondern Bundesgenossen des Kaisers, und wird ihnen der Bundesvertrag nicht gehalten, so

This understanding of *Bundestreue* turned the constitutional instruments that depended on it – most importantly the power to impose a federal intervention – into defensive weapons against parliamentary ambitions. One of the occasions where this became most obvious occurred in April 1884 when – as we have already seen in the previous two chapters – the state governments issued a joint declaration in reaction to the foundation of the *Deutsch-freisinnige Partei*, a left liberal party that openly demanded the introduction of parliamentarily responsible ministries. In no uncertain terms, the statement proclaimed that ‘the united governments are determined without exception to abide in undying allegiance by the contracts on which our federal institutions are based’.⁴⁵

All this means that Bismarck and the united governments had an understanding of *Bundestreue* that was completely different from that of the liberals and of most of the constitutional lawyers. This discrepancy reflected the tension between monarchical and parliamentary power. Due to the importance of federal allegiance for such crucial powers as the rights to monitor the implementation of laws or to intervene in the states, both sides adhered to their interpretation strictly. For this reason, it was not before 1916 – two years before the union eventually collapsed – that an attempt was made to harmonise the different concepts. In his influential essay *Unwritten Law in the Monarchical Federal State*, the young Bonn professor Rudolf Smend argued that only in their entirety did the written and unwritten parts of German constitutional law define the relations between the states and the Reich. While the constitution established the formal supremacy of the national over the state level, he maintained, the general principle of federal allegiance obliged not only the states to be loyal to each other, but also the Reich to be loyal to them:

werden sie sich auch nicht dazu verpflichtet fühlen’] Quoted in Hartmut Bauer, *Die Bundestreue: zugleich ein Beitrag zur Dogmatik des Bundesstaatsrechts und zur Rechtsverhältnislehre* (Mohr Siebeck, 1992), p. 41.

⁴⁵ [‘die Verbündeten ohne Ausnahme entschlossen sind, die Verträge, auf welchen unsere Reichsinstitutionen beruhen, in unverbrüchlicher Treue zu erhalten’] *Protokolle (DR)*, 1884, session 16, 5 April, § 180, pp. 96-8. See also Mayer, ‘Republikanischer und monarchischer Bundesstaat’, pp. 364f.

The Reich and the states are related to each other not only in a relationship of supremacy and submission – even if legal interpretation must see this as the main proposition of the constitution – but also in a relationship of allies. This means that each ally owes federal allegiance [...] to the others and to the entirety and that he has to fulfil his duties and exercise his corresponding rights in this sense.⁴⁶

According to this view, the union was based on a network of mutual loyalty between all states and the national level (see Figure 18). After the war, this idea evolved into the modern understanding of *Bundestreue*, which still plays an important role in the German federal state of today.⁴⁷

Smend tried to harmonise the competing interpretations of federal allegiance not least because he realised that they were largely politically motivated. With a view to the complex body of German constitutional law, he complained that ‘theory and parliament usually focus on the written constitution and ignore its unwritten appendix, while the united governments tend to overestimate the latter’.⁴⁸

This difference between the constitutional approaches of monarchical and parliamentary actors greatly shaped the evolution of Germany’s system of conflict resolution. As long as the monarchical governments were at the centre of the federal decision-making process, their interpretation of such open-ended concepts as federal duties or federal allegiance determined how the relevant instruments were used. But the more the federal administration controlled the *Bundesrat* and the more the *Reichstag* managed to increase its influence, the more important became the views of the parliament rather than the monarchical governments. After the federal government around the Chancellor had become dependent on the parliament, the

⁴⁶ [‘Reich und Einzelstaaten stehen nicht nur in dem Verhältnis der Über- und Unterordnung, das die staatsrechtliche Auslegung aus der Reichsverfassung zunächst als ihren Hauptinhalt entnehmen muß, sondern zugleich in dem Verhältnis des Bundes zu den Verbündeten: d.h. jeder der Verbündeten schuldet den anderen und dem Ganzen die Bundes-Treue [...] und hat in diesem Sinne seine reichsverfassungsmäßigen Pflichten zu erfüllen und seine entsprechenden Rechte wahrzunehmen.’] Smend, ‘Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat (1916)’, p. 51.

⁴⁷ On the importance of Smend’s ideas for the modern concept of *Bundestreue*, see Bauer, *Die Bundestreue*, pp. 56–65 and Stefan Oeter, *Integration und Subsidiarität im deutschen Bundesstaatsrecht*, Jus Publicum 33 (Tübingen: Mohr Siebeck, 1998), p. 52.

⁴⁸ [‘daß Theorie und Parlament sich an die geschriebene Reichsverfassung halten und ihre ungeschriebene Ergänzung verkennen, während die verbündeten Regierungen diese letztere Seite eher zu überschätzen geneigt sein werden’] Smend, ‘Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat (1916)’, p. 52.

monarchical interpretation of *Bundestreue* ceased to be relevant. As a consequence, the powers to monitor the implementation of laws and to impose federal interventions were no longer defensive weapons against the advance of parliamentarism. In short: the evolution of the federal state gradually dissolved many safety measures that the constitution had established in order to protect monarchical power. With the passing of the years, constitutional conflicts were thus increasingly decided by factors other than monarchical interests.

Implosion

The structures and mechanisms that the constitution established for the resolution of constitutional conflicts had a strongly political character. In the context of the confrontation between monarchical and parliamentary interests, any legal issue could thus easily turn into a crucial question of power. This gradually undermined the constitution to the point where it no longer guaranteed a stable framework of rules and procedures. In order to understand this impact, we have to examine concrete cases of conflict. What major problems occurred? And how did they affect the evolution of the federal state?

If we look first at conflicts that involved the states, we see that the few official procedures that existed for resolving such disputes were easy to circumvent, prone to be manipulated, and so rudimentary that they left enough room for the development of an alternative system. In order to settle constitutional conflicts that took place within their borders, the states had several options. Twelve out of the twenty-five states featured constitutions that designated special arbitrating bodies for such cases.⁴⁹ Moreover, conflicting parties could always come

⁴⁹ Saxony had an own constitutional court. Oldenburg, Brunswick, Saxe-Altenburg, and the two duchies of Mecklenburg established special arbitration tribunals. The three Hanseatic city determined special arbitration courts by 1895. While Hamburg opted for the Imperial Court, Bremen and Lübeck nominated the Hanseatic Court of Appeal in Hamburg. The constitutions of Schaumburg-Lippe and of the two principalities of Reuß

to an understanding on an appropriate settlement procedure. In this manner, the two parliaments of the composite duchy Saxe-Coburg-Gotha agreed in 1907 on asking an arbitration court to decide whether they had to convene in joint rather than separate meetings in order to adopt laws that concerned the implementation of federal legislation.⁵⁰ But this was the only major case of intra-state dispute in which such a procedure was applied, and with good reason: there was no adequate enforcement mechanism. If one of the opposing parties did not accept the verdict of the arbitration court, there was usually no authority in the states that could enforce it.

This was the great advantage of the alternative procedure that the federal constitution provided. Parties to a constitutional dispute that took place in one of the thirteen states whose constitution did not define any settlement procedures could ask the *Bundesrat* for a decision. The council was obliged first to try to bring about an amicable agreement. If this attempt failed, the *Bundesrat* and the *Reichstag* had to adopt a federal law that either made a final decision or referred the case to an arbitration court. In either case, the final ruling could be enforced by a federal intervention if necessary.⁵¹

From the perspective of the monarchical governments, the great risk of this procedure was the participation of the federal parliament. It was crucial for the protection of monarchical power to prevent the *Reichstag* from intervening in the states on behalf of the local parliaments. For this reason, the *Bundesrat* manipulated the scope of the relevant article of the constitution. The basic idea was to make it so difficult for disputes to be admitted to the settlement procedure that it could not be used as a means of liberalising the states. This strategy was borrowed from the German Confederation, where the admission standards of the

automatically referred constitutional conflicts to the responsible federal organ. See Björner, *Verfassungsgerichtsbarkeit*, pp. 83ff.

⁵⁰ On this case, see *ibid.*, pp. 97-9.

⁵¹ RV (1871), art. 76.2. On this procedure, see also Björner, *Verfassungsgerichtsbarkeit*, pp. 80-9 and Bönnemann, *Verfassungskonflikte*, pp. 93-5.

Confederate Court of Arbitration – the *Bundesschiedsgericht* – had been so high that it had never convened and had thus been dubbed a ‘stillborn child’.⁵²

The most important case in which Bismarck and the monarchical governments relied on this strategy was the decades-long conflict over the introduction of a constitution in Mecklenburg-Strelitz and Mecklenburg-Schwerin.⁵³ The two Northeast German duchies were the only states of the union that did not have modern constitutions, but maintained corporative structures. After unification, the *Reichstag* received a great number of petitions that called for the Reich to rectify this deplorable state of affairs. Between 1867 and 1874, the *Bundesrat* was asked to settle three conflicts in Mecklenburg that directly concerned the modernisation of the duchies.⁵⁴ The council rejected all of them by arguing that they did not fall within its jurisdiction. In two cases, certain groups of Mecklenburg residents tried to institute proceedings. To their requests, the council replied by declaring that it was only responsible for conflicts between the governments and parliaments of the states and that ordinary citizens thus had no right to file a suit.⁵⁵ In the third case, a magistrate from Rostock claimed that the execution of the federal trade regulation act required the Mecklenburg government to introduce a constitution. This time, the *Bundesrat* pointed out that it could only deal with matters that concerned the violation of an existing constitution, but not with the introduction of a new one.⁵⁶

⁵² [‘totgeborenes Kind’] Heinrich Albert Zachariä, *Deutsches Staats- und Bundesrecht. Das Regierungsrecht der Bundesstaaten und das Bundesrecht*, 3rd ed., vol. 2, 2 vols (Göttingen: Vandenhoeck & Ruprecht, 1867), pp. 780f. On this issue, see also Björner, *Verfassungsgerichtsbarkeit*, pp. 79f., where he too refers to Zachariä.

⁵³ The following analysis of the Mecklenburg conflict is based on Anke John's doctoral dissertation *Die Entwicklung der beiden mecklenburgischen Staaten im Spannungsfeld von landesgrundgesetzlichem Erbvergleich und Bundes- bzw. Reichsverfassung vom Norddeutschen Bund bis zur Weimarer Republik*, Rostocker Beiträge zur Deutschen und Europäischen Geschichte 2 (Rostock: Universitätsdruckerei Rostock, 1997), which is the authoritative study on this topic. I am thankful to Anke John for providing me with a copy of the manuscript.

⁵⁴ On these three cases, see Björner, *Verfassungsgerichtsbarkeit*, pp. 92, 95, 99f. and Bönnemann, *Verfassungskonflikte*, pp. 95-7.

⁵⁵ See in particular the report by the *Bundesrat* Committee of Justice, 31 May 1869, printed in Poschinger, *Bundesrat*, vol. 1, p. 269.

⁵⁶ *Protokolle (DR)*, 1874, session 10, 15 February, § 94, pp. 69f.

The political motivation behind this argument was obvious. In light of the support that the *Reichstag* lent to the steady flow of petitions from Mecklenburg, Bismarck saw the common opposition of the monarchical governments against the modernisation of the duchies as a matter of *Bundestreue*. In October 1871, the *Bundesrat* plenipotentiary Bernhard Ernst von Bülow reported to his home government in Schwerin that

according to the Prince [Bismarck], the whole issue of the Mecklenburg constitution must not be taken to the *Reichstag*; we have to stand up to such attempts as a matter of principle, [Bismarck maintained], by saying that they do not fall within our jurisdiction. He would never think of permitting such momentous constitutional changes; if the *Reichstag* urges us to do so, [he made clear], then we will deal with the matter as a question of force and we will see who is the strongest.⁵⁷

This report shows that for Bismarck and the united governments the question of whether the Reich should deal with disputes from Mecklenburg was less a legal than a political issue. Their main focus was on preventing the creation of any precedent that would allow the federal parliament to require the states to reform their constitutions. From this perspective, it is no surprise that the *Bundesrat* only ever admitted two cases of intra-state conflict, both of which concerned merely technical questions of infrastructure and public finance in two rather insignificant states, namely Waldeck-Pyrmont and Lippe.⁵⁸

Matters were entirely different when two states got into conflict with each other. In such disputes, the main problem for the state governments was not to keep the *Reichstag* at bay, but to settle their disagreement in a way that was fair and avoided bad blood between them. This was not least a question of monarchical solidarity, which usually prevented the governments from confronting each other. Unity in the face of the parliamentary menace was

⁵⁷ [‘Die ganze mecklenburgische Verfassungssache, so sagte der Fürst, gehöre nicht vor den Reichstag; man müsse dem im Prinzip durch Bestreitung der Kompetenz widerstehen. Er denke nicht daran, Verfassungsänderungen von solcher Tragweite zuzugeben; wenn der Reichstag in der Weise dränge, komme man bei der Frage der Gewalt und wer der Stärkste sei, an.’] Quoted in John, *Die Entwicklung der beiden mecklenburgischen Staaten*, p. 147.

⁵⁸ On these cases, see Björner, *Verfassungsgerichtsbarkeit*, pp. 95-7 and Bönnemann, *Verfassungskonflikte*, p. 97.

the core of federal allegiance. Over the whole imperial era it thus happened only seven times that states took legal proceedings against each other.⁵⁹

But there was also another reason for the low number of cases. In one way or another, disputes between states often concerned the implementation of federal laws. With reference to the power of *Reichsaufsicht*, the *Bundesrat* could bring such cases under its control and decide them without the conflicting states entering official proceedings.⁶⁰ This possibility practically put the council and – after the Prussian bench had been taken over by executives of the *Reichsämtler* – the federal government around the Chancellor in charge of inter-state conflict, because it was easy for them to find a suitable pretext in the complex net of overlapping federal and state competences. In 1872, for example, the *Bundesrat* seized control of a dispute between Prussia and Hesse over the taxation of civil servants by referring to a federal law on the effects of double taxation.⁶¹

Technical issues like taxation were typical subject-matters of inter-state conflicts. All of the seven disputes that were referred to the *Bundesrat* for resolution concerned very specific juridical problems, most often issues of territorial demarcation or property law. For a political organ like the *Bundesrat*, it was extremely difficult to deal with the legal complexity of such issues. The steadily increasing workload of the council made matters worse. Soon after unification, the Judiciary Committee – chaired by the Prussian minister of justice Heinrich von Friedberg – thus decided to establish a system of delegation. In 1877, the Committee used a conflict between Prussia and Saxony as opportunity to establish a precedent. By delegating the decision to the regional court of appeal in Lübeck and by accepting its judgment as

⁵⁹ See the surveys in Björner, *Verfassungsgerichtsbarkeit*, pp. 52-64 and Bönnemann, *Verfassungskonflikte*, pp. 85-91.

⁶⁰ On the priority of *Reichsaufsicht*, which flowed from the superiority of federal over constituent-state law, see Björner, *Verfassungsgerichtsbarkeit*, pp. 40f. and Bönnemann, *Verfassungskonflikte*, p. 83.

⁶¹ *Protokolle (DR)*, 1872, session 34, 21 June, § 390, p. 240. On this case, see Björner, *Verfassungsgerichtsbarkeit*, p. 51, fn. 259.

legally-binding, the *Bundesrat* made clear that from now on it would entrust specialised courts with resolving conflicts between states.⁶²

After the Imperial Court had been established in 1879 (see above), the council referred all such cases to this national judicial institution. This way, the Imperial Court became the customary constitutional court for inter-state conflicts. Although this development guaranteed states a fair trial, one cannot conclude – as some legal historians have done – that a system of ‘modern constitutional jurisdiction’ evolved.⁶³ There were two major problems. First, in cases that involved Prussia political power still trumped legal decisions. Due to Prussia’s hegemonic status in the union, no verdict could bind her government if it contradicted her fundamental interests. In a conflict with Saxe-Weimar and Saxe-Coburg-Gotha, for example, the Federal Commercial High Court ordered Prussia in 1878 to stop taxing a certain railroad company. Instead, the Prussian government not only continued to collect taxes, but even increased them. In the end, it settled the unnerving issue by simply buying all shares that the two Thuringian states held in the railway line.⁶⁴ The message could hardly have been clearer: no matter what any court decided, Prussia could always get her will by relying on her political, economic, financial, and military superiority. It was only for reasons of *Bundestreue* that the Prussian government accepted arbitral settlements in the great majority of cases.

The second major problem of the customary jurisdiction of the Imperial Court was that the state governments did not like it. They usually preferred political compromise to the unpredictable verdict of the court in Leipzig. This is why they often either prevented conflicts from being delegated to the court by not bringing them up before the *Bundesrat* in the first place; or why they reached an agreement in the midst of official proceedings. The governments of Schwarzburg-Sondershausen and Schwarzburg-Rudolstadt, for example,

⁶² Poschinger, *Bundesrat*, vol. 3, pp. 336-9. For the court ruling, see ‘Die Entscheidung des Lübecker Ober-Apellations-Gerichts bezüglich der Berlin-Dresdener Eisenbahn’, *Annalen*, 1877, pp. 993–1010. On the case and the decision of the Judiciary Committee, see also Björner, *Verfassungsgerichtsbarkeit*, pp. 45, 56ff., 64ff. and Bönnemann, *Verfassungskonflikte*, p. 86.

⁶³ [‘moderne Verfassungsgerichtsbarkeit’] Björner, *Verfassungsgerichtsbarkeit*, p. 68.

⁶⁴ On this case, see *ibid.*, pp. 52-6 and Bönnemann, *Verfassungskonflikten*, pp. 87-9.

made an arrangement about the allocation of the shared assets of the two princely houses just before the *Bundesrat* wanted to refer the case to the Imperial Court. The same happened in a conflict between Prussia and Mecklenburg about the damming of a lake.⁶⁵ It therefore seems that if state governments entered legal proceedings, they only did so because they saw them as a means of expediting a political compromise.

Nevertheless, the authority of the Imperial Court did greatly increase over the years. After the turn of the century, even states that settled disputes without the help of the *Bundesrat* routinely nominated it as arbitration court. In 1916, for example, Prussia and Brunswick followed this procedure in order to determine the distribution of revenues from a joint lottery.⁶⁶

Moreover, the customary jurisdiction of the Imperial Court was not limited to inter-state conflicts. The Leipzig court also evolved into the most important institution for the resolution of disputes between the national level and the states. But whether or not such cases were referred to the court dependent on one crucial factor: the political importance of the matter at stake. All cases that were brought before the court dealt with more or less trivial problems, for example the use of public buildings, the repair of a railway coach, the construction of a train tunnel, or the operation of a modern system of telegraphy by a commercial shipping line.⁶⁷ None of these issues was politically relevant. Whenever the Reich and a state fought over a question of greater significance, the federal executive and the monarchical governments took care that the court would not get involved, in particular if the special status of Prussia and/or the structural protection of monarchical sovereignty were concerned.

This strategy and its consequences become clear if we consider three of the most intense conflicts that occurred between the Reich and Prussia. The 1877 federal judiciary act obliged

⁶⁵ On these two cases, see Björner, *Verfassungsgerichtsbarkeit*, pp. 59f., 60-2 and Bönnemann, *Verfassungskonflikte*, pp. 89f.

⁶⁶ On this case, see Björner, *Verfassungsgerichtsbarkeit*, pp. 63f.

⁶⁷ On these cases, see *ibid.*, pp. 71-6 and Bönnemann, *Verfassungskonflikte*, pp. 98-101.

the states to create regional appeal courts.⁶⁸ Bremen had difficulties meeting this obligation, because her population was too small to constitute a full judicial district. In order to solve this problem, the city-state asked Prussia to establish a joint district with parts of the neighbouring Prussian province of Hanover.⁶⁹ Bismarck supported this plan. In the *Bundesrat*, Bremen had always been a reliable ally in the fight against parliamentary demands. Prussian help, Bismarck claimed, was thus a matter of *Bundestreue*.⁷⁰ But most Prussian ministers rejected this idea. They maintained that this way of meeting obligations that arose from a federal law infringed upon Prussia's sovereignty, because the states had the right to organise their judicial districts independently.⁷¹ The resulting conflict became so intense that at one point Bismarck threatened the Prussian cabinet with imposing a federal intervention on Prussia. With reference to the power of *Reichsaufsicht*, the Chancellor pointed out that he had to make sure that the states properly implemented federal laws. Due to this duty, he argued, he could assume no responsibility for Prussia's refusal to cooperate with Bremen.⁷²

At the centre of this conflict, there were two fundamental questions about the confusing web of federal and state rights: could a federal law establish obligations whose fulfilment presupposed an intervention in state sovereignty? And did the Chancellor – the highest executive official of the union – generally have to give priority to federal interests, even though he was also prime minister of Prussia? Only a court ruling could have clarified these issues. But Bismarck and the Prussian cabinet never even considered taking the conflict to court, because a verdict could have damaged Prussia's structural hegemony. Driven by such fears, they eventually agreed on a political compromise. At the intercession of the Prussian government, Bremen, Hamburg and Lübeck founded the Hanseatic Court of Appeal in 1879.

⁶⁸ *Gerichtsverfassungsgesetz*, 27 January 1877, RGBl. (1877), no. 4, pp. 41-76.

⁶⁹ On this issue and the ensuing conflict, see Kersten Rosenau, *Hegemonie und Dualismus. Preußens staatsrechtliche Stellung im Deutschen Reich*, Verfassungsgeschichte der Neuzeit. Studien zur Deutschen Verfassungsgeschichte (Regensburg: Roderer, 1986), p. 94.

⁷⁰ See Bismarck's letter to the Prussian Minister of Justice Adolph Leonhardt, 18 February 1877, printed in Goldschmidt, *Kampf*, no. 31, pp. 177-9.

⁷¹ See the report by the Prussian State Minister without Portfolio and Federal State Secretary for Foreign Affairs Bernhard von Bülow, 19 October 1877, printed in *ibid.*, no. 33, pp. 181-3.

⁷² See Bismarck's letter to the Prussian State Ministry, 15 November 1877, printed in *ibid.*, no. 35, pp. 184-8.

The legal uncertainty about the inviolability of state sovereignty and the role of the Chancellor remained. This lack of clarity undermined the federal order greatly, not least because it provided fertile ground for more disputes of this kind.

Conflicts about state sovereignty were most intense when it was the federal parliament that tried to intervene in the states. This was the case, for example, in the context of Prussia's immigration policy in the 1880s.⁷³ After the number of Polish immigrants to Prussia's eastern provinces had risen sharply, the Prussian government decided in 1885 to expel 30 000 Russian and Galician Poles. The Polish Party immediately turned to the *Reichstag* for help. On 1 December, a broad coalition of 155 MPs, ranging from the Centre Party to the Social Democrats, submitted an interpellation that asked the Chancellor to clarify what measures he intended to take against the deportation policy of the Prussian government.⁷⁴

As a reply, Bismarck read out a declaration on behalf of the Emperor that condemned the parliamentary initiative strongly. The interpellation was based on false assumptions, he argued, because it presumed that a federal government existed and that the *Reichstag* could require this government to control how the states dealt with their sovereign affairs. As the interpellation thus violated the constitution, he pointed out, the Emperor would take any measures – including military actions – necessary to protect the rights of the united governments against any further demands for intervention. In order to underline the seriousness of this warning, Bismarck and the present *Bundesrat* plenipotentiaries left the assembly room of the *Reichstag* immediately after his speech.⁷⁵

In the following budgetary debate, the liberal MPs – above all the constitutional lawyers Albert Hänel and Heinrich Marquardsen – exposed the ambiguity of the intervention practice

⁷³ On Prussia's immigration policy, see William W. Hagen, *Germans, Poles, and Jews: The Nationality Conflict in the Prussian East, 1772-1914* (Chicago: University of Chicago Press, 1980), especially chapter 5, pp. 118-58. For a good overview of the main issues, see Christopher M. Clark, *Iron Kingdom: The Rise and Downfall of Prussia, 1600-1947* (London: Allen Lane, 2006), pp. 76-82. On the constitutional dimension of the conflict on immigration, see Huber, *Verfassungsgeschichte*, vol. 4, pp. 458ff. and Rosenau, *Hegemonie und Dualismus*, p. 65f.

⁷⁴ *Stenographische Berichte (DR)*, 1885, session 8, 1 December, p. 130. For the text of the interpellation, see *Drucksachen (DR)*, 1885, vol. 1.2, no. 25.

⁷⁵ For the declaration, see *Stenographische Berichte (DR)*, 1885, session 8, 1 December, pp. 130f.

of the federal executive. Moreover, they showed that there were several possible ways of inferring from the constitution a right of the Reich to stop Prussia's deportation policy.⁷⁶ Without the decision of a court, however, their arguments came to nothing. For obvious reasons, the Prussian government had no interest in entering into legal proceedings with the *Reichstag*. Too great was the risk that a court could confirm that since the unification an independent federal government had developed and that the *Reichstag* had the right to ask this national cabinet to review the constitutionality of state policies. Such a verdict would not only have strengthened demands for making the Chancellor and the state secretaries parliamentarily responsible; but it would also have given the *Reichstag* the power to intervene in the states. Under these circumstances, Bismarck increased political pressure as much as possible and let the conflict peter out. The underlying legal questions were never solved. While the persistent ambiguity of the legal framework enabled the federal executive to continue to make interventions in the states dependent on whether or not they protected monarchical power, it was extremely harmful to the stability of the federal system.

The electoral law of the Prussian House of Representatives too had a disruptive impact on federal government, as Chapter 3 has shown.⁷⁷ From the end of the nineteenth century, criticism against the Prussian three-class franchise increased across most parties, because it produced much more conservative majorities than the liberal electoral law of the *Reichstag*, where by 1912 the Social Democrats had become the strongest party. These diverging

⁷⁶ Hänel derived the legitimacy of an intervention from the federal competence for the immigration police, while Marquardsen pointed to the federal power over all questions relevant to foreign policy. See *ibid.*, pp. 137-9, 141f. See also the analysis of the parliamentary debate by Huber, *Verfassungsgeschichte*, vol. 4, p. 487.

⁷⁷ For an overview of the Prussian electoral system, see Clark, *Iron Kingdom*, pp. 559-62, where he calls the three-class franchise a part of 'the residual federalism of the German system [that] ensured that Prussia retained its distinctive political institutions'. On the constitutional issues involved, see Huber, *Verfassungsgeschichte*, vol. 4, pp. 374-9.

majorities made governing Germany extremely difficult, because the Chancellor – who also held the office of Prussian prime minister – had to cooperate with both parliaments.⁷⁸

In 1905, the Social Democrats introduced a motion into the *Reichstag* that proposed amending the constitution to the effect that each state would be obliged to have a parliament that was elected according to the standards of the federal electoral law.⁷⁹ From a democratic perspective, the adoption of such a homogeneity requirement would not only have solved the franchise problem in Prussia, but it would also have forced the two Mecklenburg duchies to establish modern parliaments.

There was no doubt that the social democratic proposal was well-founded, because the Reich could amend the constitution by an ordinary law any time.⁸⁰ The central legal issue was a much more fundamental question: could a state be forced to change its electoral law in order to facilitate federal government? In light of Prussia's hegemonic status and the interconnection of the Prussian and federal constitution, the Social Democrats and some liberals argued that electoral reform could be seen as a federal duty of Prussia towards the federation. The highest-ranking Prussian and federal executives, however, saw a conservative House of Representatives as an insurance against a further expansion of parliamentary power. For this reason, they insisted that a homogeneity requirement was incompatible with the sovereignty of the states. But they were under no illusion that the legal situation was very unclear. Hence, they took care that the debate would not be shifted from the parliament to the courtroom by mobilising the anti-socialist majority in the *Reichstag*, which defeated the motion.⁸¹ After this had happened to all such proposals over the following years, the Social

⁷⁸ See the remarks by the Prussian State Minister without Portfolio and federal State Secretary of the Interior Arthur von Posadowsky-Wehner in the *Reichstag. Stenographische Berichte (DR)*, 1906, session 37, 7 February, pp. 1087-9.

⁷⁹ The motion 'Gesetz, betreffend die Volksvertretung in den Bundesstaaten und in Elsaß-Lothringen' can be found in *Drucksachen (DR)*, 1905, vol. 1, no. 94. It is worth pointing out that the motion also tried to introduce women's suffrage by granting the right to vote to all citizens older than twenty.

⁸⁰ RV (1871), art. 78.

⁸¹ See *Stenographische Berichte (DR)*, 1906, session 49, 21 February, pp. 1079ff. The final decline of the motion can be found on p. 1492. For a concise analysis of the different positions, see Huber, *Verfassungsgeschichte*, vol. 4, p. 375.

Democrats eventually saw no other option but to take the protest against the three-class franchise to the streets. In spring 1910, they organised a series of demonstrations in Berlin that involved up to 250 000 participants.⁸²

These mass demonstrations were impressive manifestations of the fact that conflicts about important structural issues – such as the complex relationship between Prussia and the union or the extent of state sovereignty – were usually addressed by political rather than legal means. This problem became particularly obvious in two controversies that burdened the Empire for most of its lifetime: the succession conflicts in Brunswick and Lippe.⁸³ These were different from other constitutional disputes because they involved dynasties rather than states, a feature that made conflict resolution more complicated rather than easier. In a union shaped by the confrontation of monarchical and parliamentary power, questions of succession and regency were naturally among the most sensitive issues.⁸⁴

This is why the devolution of the crowns in the two relatively unimportant Northwest German small states became an issue of national significance in the first place. But the precise circumstances of the conflicts were very different. In Brunswick, the throne became vacant in 1884. According to the relevant house rules, the succession fell to the Duke of Cumberland who was the head of the Guelph family, the dynasty that had ruled Hanover until Prussia had annexed the kingdom in 1866. Even after the Guelphs had been disempowered and

⁸² See Bernd Jürgen Warneken, *Als die Deutschen demonstrieren lernten: Das Kulturmuster 'friedliche Strassendemonstration' im preussischen Wahlrechtskampf 1908-1910* (Tübingen: Tübinger Vereinigung für Volkskunde, 1986). On the constitutional dimension, see Huber, *Verfassungsgeschichte*, vol. 4, pp. 378f.

⁸³ The most authoritative studies on the two disputes are respectively Wilhelm Bringmann, *Die braunschweigische Thronfolgefrage. Eine verfassungsgeschichtliche Untersuchung der Rechtmäßigkeit des Ausschlusses der jüngeren Linie des Welfenhauses von der Thronfolge in Braunschweig 1884-1913*, Europäische Hochschulschriften 377 (Frankfurt am Main: Lang, 1988) and Anna Bartels-Ishikawa, *Der Lippische Thronfolgestreit: eine Studie zu verfassungsrechtlichen Problemen des Deutschen Kaiserreiches im Spiegel der zeitgenössischen Staatsrechtswissenschaft*, Rechtshistorische Reihe 128 (Frankfurt am Main: Lang, 1995). On the Lippe crisis, see also Elisabeth Fehrenbach, 'Der lippische Thronfolgestreit', in *Politische Ideologien und nationalstaatliche Ordnung. Festschrift für Theodor Schieder*, ed. Kurt Kluxen and Wolfgang J. Mommsen (Munich and Vienna: Oldenbourg, 1968), 337–55. For more concise examinations of the two conflicts, see Björner, *Verfassungsgerichtsbarkeit*, pp. 105-32; Bönnemann, *Verfassungskonflikte*, pp. 104-9; and Huber, *Verfassungsgeschichte*, vol. 4, pp. 428-36.

⁸⁴ On the general nature of succession conflicts in the Empire, see Björner, *Verfassungsgerichtsbarkeit*, pp. 101f. and Bönnemann, *Verfassungskonflikten*, p. 101.

expropriated, Bismarck continued to see them as *Reichsfeinde*, meaning as enemies of the union. He distrusted them not least because the Hanoverian members of the *Reichstag* – above all the leader of the Centre Party, Ludwig Windthorst – belonged to the most outspoken critics of Prussian hegemony. Due to the support that the Guelphs could have lent to this kind of opposition, Bismarck wanted to prevent them at all costs from regaining a German throne.

In Lippe, the dynastic situation was more complicated. When Prince Woldemar died childless in 1895, the crown fell to his unmarried brother Karl Alexander who was mentally retarded and lived in an institution for the insane. Lippe thus needed a regent who would become the next prince after Karl Alexander's death. The three dynastic branches Schaumburg-Lippe, Lippe-Biesterfeld, and Lippe-Weißenfeld each had legitimate claims to the throne. A nasty quarrel broke out, in which the Kaiser played a central role. William II's sister was married to Adolf von Schaumburg-Lippe, whom Woldemar's testament designated as heir. Encouraged by this provision, the Emperor was determined to exploit the crisis in order to provide his sister with the Lippe throne.

The two local conflicts dragged the union into serious constitutional crises when the *Bundesrat* took action at the behest of Bismarck and William, respectively. Even though the constitution gave the Reich no explicit right to deal with dynastic disputes, the council – after some hesitation – excluded the Duke of Cumberland from the Brunswick succession and determined that it would choose a permanent heir apparent for Lippe, where an arbitration court had appointed a provisional regent, after Karl Alexander died.⁸⁵ In order to justify these decisions, the *Bundesrat* referred to the ambiguous principles on which its general judicial competences were based. While the official declarations were rather technical in the Lippe case, those in the Brunswick conflict invoked federal duties and *Bundestreue* in very clear terms. The Duke of Cumberland was prohibited from ascending to the throne, the *Bundesrat* argued,

⁸⁵ *Protokolle (DR)*, 1885, session 29, 2 July, § 422, pp. 252f.; and 1899, session 1, 5 January, § 16, pp. 5-7.

because his relation to the federation contradicts the peace among the members of the union, which is guaranteed by the constitution, [and because] his claims to parts of the federal territory [namely Hanover] are incompatible with the basic principles of the unification treaties and the constitution.⁸⁶

It is striking that the *Bundesrat* could not cite any more specific reasons for its intervention. The lack of clarity shows that the whole procedure was politically motivated. The council came under enormous pressure in both cases. When it first hesitated to interfere in the Brunswick conflict because of the lack of a clear legal basis, Bismarck reminded it that it was ‘a political agency and no council of judges’. If it would not take measures against the Guelphs, he threatened, Prussia would simply annex Brunswick.⁸⁷ The Emperor was no less determined. After an arbitration court had decided the Lippe dispute in favour of the Lippe-Biesterfeld line, William encouraged his brother-in-law to challenge this verdict. The resulting protest note argued that Ernst zur Lippe-Biesterfeld could not succeed to the throne, because the mother of his wife had been a commoner and atheist.⁸⁸ In order to demonstrate his support for this view, the Kaiser prohibited the troops that were stationed in Lippe from saluting Ernst.⁸⁹

William’s anger soon moved the *Bundesrat* to reopen the Lippe case. The priority of political interests over legal considerations was even more obvious in the Brunswick crisis. Here, the whole conflict was eventually resolved by a marital arrangement. In 1913, Ernst August of Cumberland married Victoria Louise of Prussia, William’s only daughter. In addition, he joined the Prussian army and swore an oath of allegiance to the Emperor –

⁸⁶ [‘da derselbe sich in einem dem reichsverfassungsmäßig gewährleisteten Frieden unter Bundesgliedern widerstreitenden Verhältnisse zu dem Bundesstaate befindet [und weil] die von ihm gelten gemachten Ansprüche auf Gebietsteile dieses Bundesstaates [...] mit den Grundprinzipien der Bündnisverträge und der Reichsverfassung nicht vereinbar [sind]’] *Protokolle (DR)*, 1885, session 29, 2 July, § 422, pp. 252.

⁸⁷ [‘eine politische Behörde und kein Richter-Kollegium ist’] See Bismarck’s letter to the State Secretary of the Interior Karl Heinrich von Boetticher, 9 June 1885, printed in Bringmann, *Die braunschweigische Thronfolgefrage*, pp. 132f.

⁸⁸ *Drucksachen (DR)*, 1898, vol. 1, no. 8. See also the remarks by Julius Lentzmann, liberal MP for Hagen/Westfalen, in *Stenographische Berichte (DR)*, 1899, session 11, 17 January, p. 239.

⁸⁹ See Huber, *Verfassungsgeschichte*, vol. 4, p. 435, fn. 58.

problem solved.⁹⁰ A few months later, the *Bundesrat* decided on the initiative of the Prussian government that the peace of the union would no longer be at risk if Ernst August ascended to the Brunswick throne.⁹¹

All this demonstrates that the settlement procedures of the two succession disputes were shaped by political pressure, threats, and deals rather than official proceedings, legal arguments, and court rulings. But the Lippe crisis, in particular, was also a turning point in the development of the conflict resolution system of the union. On the one hand, the case was the first major constitutional dispute in which external experts were directly involved in the resolution process. Some of the most important constitutional lawyers of the time – such as Paul Laband, Hermann Rehm, Max von Seydel, and Philipp Zorn – were asked to provide legal opinions on whether or not the *Bundesrat* had a right to deal with succession questions. Even though their reports did not have much influence on how the matter was handled, their involvement was a significant step towards the professionalisation of Germany's dispute settlement procedures.⁹²

On the other hand, the legally doubtful intervention of the *Bundesrat* triggered massive protest from the *Reichstag*, the broader public, and even some officials from the states. Many used this occasion to criticise the judicial competences of the council more generally, arguing that the natural body to decide constitutional conflicts would be the Imperial Court.⁹³ Under this public pressure, the three dynastic lines agreed in 1904 on an arbitration treaty that

⁹⁰ See the protocol of the Prussian State Ministry, 16 October 1913, and Ernst August's letter to Chancellor Theobald von Bethmann Hollweg, 20 April 1913, both printed in Bringmann, *Die braunschweigische Thronfolgefrage*, pp. 211ff.

⁹¹ For the Prussian motion, see *Drucksachen (DR)*, 1913, vol. 2, no. 125. Also printed in Bringmann, *Die braunschweigische Thronfolgefrage*, pp. 212f.

⁹² For bibliographical and archival details on the reports of the lawyers, see Bartels-Ishikawa, *Der Lippische Thronfolgestreit*, pp. XIII-XV. For a good overview of the complex juristic discussion, see Björner, *Verfassungsgerichtsbarkeit*, pp. 113-16 and Bönnemann, *Verfassungskonflikte*, pp. 124-30.

⁹³ For a parliamentary reaction, see the speech by the liberal Julius Lentzmann in *Stenographische Berichte (DR)*, 1899, session 11, 17 January, p. 236-42, especially p. 240. In the *Bundesrat*, Bavaria, Saxe-Meiningen, Schwarzburg-Sondershausen, Reuß ältere Linie, and Lippe voted against the intervention in the succession conflict. See *Protokolle (DR)*, 1899, session 1, 5 January, § 16, pp. 5-7. Bartels-Ishikawa, *Der Lippische Thronfolgestreit*, pp. 174-221 shows which constitutional lawyers publicly opposed the intervention. Among them were Max von Seydel, Wilhelm Reutling, Wilhelm Kahl, Karl Binding, Heinrich Trierpel, Walther Schücking, Felix Stoerck, and the entire law faculty of the University of Leipzig.

entrusted a group of judges from the court with a final decision on the succession.⁹⁴ This conclusion of the longstanding conflict greatly bolstered the judicial authority of the Imperial Court while reducing that of the *Bundesrat*. Indeed, after the end of the Lippe controversy the council was never again asked to resolve a constitutional dispute. Instead, conflicting parties routinely concluded arbitration agreements from then on.⁹⁵

But it is important to keep things in perspective. The Lippe crisis did not turn the Imperial Court into a general constitutional court of the Empire. For this status, it lacked both the official constitutional basis and the scope of jurisdiction. The most important judicial competences still rested with the *Bundesrat*, even if it was no longer called upon to actually resolve conflicts. Moreover, the Imperial Court never evolved into an institution to which all matters of constitutional conflict were automatically referred. In particular, it did not gain any authority over those issues that were arguably most important for the development of the federal state: the relations between the federal constitutional organs and the constitutionality of laws.

For the resolution of conflicts about these matters, the constitution did not establish any legal framework. As a result, such disputes were not decided by procedural rules, but solely by the power plays of the different actors in the political arena. In this context, the constitution and the federal nature of the union mattered little. The unrestrained character of the political process and the lack of judicial review thus contributed greatly to the gradual implosion of the federal order.

This problem became manifest in the permanent struggle between the federal constitutional organs that we have seen in Chapter 3. Driven by the underlying confrontation of monarchical and parliamentary power, the *Bundesrat*, the *Reichstag*, the Emperor, the Chancellor, and – under the latter’s direction – the different branches of the federal administration fought

⁹⁴ *Drucksachen (DR)*, 1904, vol. 2.2, no. 131. *Protokolle (DR)*, 1904, session 38, 18 November, § 680, pp. 370f.

⁹⁵ See Björner, *Verfassungsgerichtsbarkeit*, p. 130.

constantly over competences that the constitution did not clearly allocate or that the growing centralisation of the union newly created. The central problem of such conflicts was that they could never be resolved. There was no institution with the power to decide with whom contested powers actually rested. Legal uncertainty about who had the right to do what was therefore a dominant feature of federal government.

Bismarck tried to address this problem by strengthening the position of the Chancellor as much as possible. When quarrels between the different federal departments, the *Reichsämtler*, greatly increased after the state secretaries had been made functional proxies of the Chancellor in 1878, he determined that all conflicts about matters of competence had to be referred to him.⁹⁶ He underlined that ‘the constitution equipped only the Chancellor with the status of a responsible federal minister and – for this reason – with the direction of all matters that fall into the executive authority of the Emperor.’ From this, it followed, he argued, that ‘the provisions of the constitution are sufficiently considered if the Chancellor makes a decision’ about unclear competences.⁹⁷ The problem of this approach was that its success depended solely on the personal authority of the Chancellor. As Bismarck’s successors could not match him in this regard, the struggle for competences reached an entirely new level of intensity after his resignation.

This was all the more problematic because the legal uncertainty that flowed from the lack of an adequate conflict resolution mechanism concerned not only technical competences of the federal bureaucracy, but also some of the most fundamental powers in the interplay of the monarchical executive and the parliamentary legislature. It was totally unclear, for example, who held the power to sanction laws. The constitution left the question open as to whether

⁹⁶ For the introduction of the proxies of the Chancellor, see *Gesetz, betreffend die Vertretung des Reichskanzlers*, 17 March 1878, RGBl. (1878), no. 4, pp. 7f. On the importance of the Proxy Law for the development of federal government, see Chapter 3.

⁹⁷ [‘Die Verfassung weist dem Reichskanzler allein die Stellung als des verantwortlichen Reichsministers zu und damit auch die Leitung der in der Regierungsgewalt des Kaisers liegenden Angelegenheiten.'], [‘Den Bestimmungen der Verfassung ist stets Genüge geleistet, sobald eine Entscheidung des Reichskanzlers ergangen ist’] Bismarck’s letter to the state secretaries of the Federal Department for Postal Affairs and the Federal Treasury, Heinrich von Stephan and Emil von Burchard, 10 June 1883, printed in *Gesammelte Werke*, vol. 5, no. 356, pp. 460f.

pieces of federal legislation obtained legal force as soon as the *Bundesrat* and the *Reichstag* had enacted them; or whether they first needed to be promulgated by the Emperor. This issue was important because according to one reading of it the Kaiser had the power to veto laws. It was generally accepted that he could stop a law for formal reasons. Most constitutional lawyers even argued that he was obliged to check whether laws had come into being according to the constitutionally determined process of legislation. But it was a matter of great controversy whether he could prevent laws from entering into force with reference to their material content.⁹⁸

As there was no constitutional court that could have confirmed or rejected the existence of such a political veto, the federal decision-making process created precedents in its own right. The most important incident occurred in 1880 when the *Bundesrat* amended a reform of the postage law against the votes of the Prussian, Bavarian, and Saxon governments. In response to this decision, Bismarck handed in his resignation, arguing that he could not assume the responsibility for a bill that had been adopted without the approval of the three biggest German states. William I did not accept this move. Instead of appointing a new chancellor who would countersign the bill and would thus enable him to promulgate it, the Emperor ordered Bismarck to resolve the conflict. Under this pressure, the *Bundesrat* revised the law according to Bismarck's wishes only four days later. In this manner, the Emperor had successfully forced material changes to the bill.⁹⁹

Such an intervention was very unusual. It happened on only one further occasion that the Emperor vetoed a law on political grounds. In the few months of his reign, the liberally-minded Frederick III tried to prevent an extension of the Anti-Socialist Laws and a reform of

⁹⁸ For a detailed discussion of these issues, see Oliver F. R. Haardt, 'The Kaiser in the Federal State (1871-1918)', *German History* 34, no. 4 (2016), pp. 542-5, on which the following section is based. The article can be found in the appendix of this thesis.

⁹⁹ *Ibid.*, pp. 542f.

the legislative period of the *Reichstag*.¹⁰⁰ Due to the lack of any other relevant cases, most contemporary lawyers concluded that the Emperor did not officially possess a political veto, because such a customary power could only evolve by constant practice.¹⁰¹

But this theoretical view missed the point. Whether or not a customary veto power actually emerged over the years was irrelevant. No one could prevent the Emperor from refusing to promulgate a law. Moreover, there was no institution that could declare a political veto invalid.¹⁰² For these reasons, the postage case was ‘a precedent with grave implications for the development of the organic relations between the authority of the Emperor and the legislature’, as Albert Hänel put it.¹⁰³ The fact that William had successfully stopped a law on political grounds gave the office of the Emperor a pre-emptive influence on legislation. When preparing and negotiating laws after the postage case, the *Bundesrat*, *Reichstag*, state secretaries, and Chancellor had to take into account the possibility of the Emperor vetoing their plans once again, meaning they had to consider his basic interests, whether they liked it or not. This made the legislative process much more complicated, in particular under William II. His habit of sporadically intervening in federal government made a veto against any bill a real possibility, above all in those fields that captured his interest, such as colonial or naval affairs. By thus moving the legislative and administrative bodies of the union to pursue or refrain from pursuing a certain course, the Kaiser enjoyed an indirect influence over federal legislation that must be seen as an important factor in his attempt to personally control national politics.¹⁰⁴

¹⁰⁰ Tim Ostermann, *Die verfassungsrechtliche Stellung des Deutschen Kaisers nach der Reichsverfassung von 1871* (Frankfurt am Main: Lang, 2009), p. 148f.

¹⁰¹ See for example Conrad Bornhak, ‘Die verfassungsrechtliche Stellung des deutschen Kaiserthums’, *Archiv für öffentliches Recht* 8 (1893), pp. 155f.

¹⁰² See Richard Fischer, *Das Recht des Deutschen Kaisers* (Berlin: Moeser, 1895), p. 158, Mohl, *Das deutsche Reichsstaatsrecht. Rechtliche und politische Erörterungen*, pp. 292-4, and especially Walter Frommann, ‘Die Beteiligung des Kaisers an der Reichsgesetzgebung’, *Archiv Für Öffentliches Recht* 14 (1899), p. 91.

¹⁰³ [‘ein Präzedenzfall, der für die Entwicklung des organischen Verhältnisses zwischen der kaiserlichen Gewalt und der Gesetzgebung gewichtig ist’] Albert Hänel, *Die organisatorische Entwicklung der Deutschen Reichsverfassung*, Studien zum Deutschen Staatsrechte, 2.1 (Leipzig: Haessel, 1880), p. 53.

¹⁰⁴ Haardt, ‘The Kaiser in the Federal State (1871-1918)’, p. 545.

This influence could have been limited only if the power to sanction laws had been clearly allocated to one of the legislative organs, for example by the decision of a constitutional court. As there was no such institution, many fundamental questions about the relations between the main federal bodies were never clarified. This lack of legal certainty enabled the conflict between monarchical and parliamentary power to completely change the functions and powers of the constitutional organs, as Chapter 3 has shown, with the result that a national government emerged under the Chancellor; that the federal parliament increasingly held this government responsible; and that the council of states became totally marginalised by this development. It was therefore not least the lack of an institution with the power to delimit competences that made Germany's transformation into a unitary state possible in the first place.

In retrospect, then, Bismarck was wrong when he claimed that a national constitutional court would inevitably be a danger for the independence of the states. Rather, it seems that such an institution could have offered them some degree of protection against the gradual centralisation of Germany. This appears even more likely when we consider the consequences of the fact that there was no practice of reviewing the constitutionality of federal laws. Ironically, it was the Imperial Court that declared in the 1880s that a process of judicial review did not exist. No judge had the right to check whether the provisions of federal laws violated the constitution and – if they did – to annul them. As long as the rules of the legislative process had been observed, no law could be revoked. The legal validity of laws thus depended on nothing but the political compromise between the constitutional organs.¹⁰⁵

Due to this lack of judicial review, federal laws constantly broke the constitution. A good example can be found in the field of finance, an area that was fiercely contested between the federal executive, the states, and the *Reichstag*. When Germany turned to protectionist economic policies in 1878/79, it was unclear what should be done with the additional revenue

¹⁰⁵ On the lack of judicial review and the relevant decisions by the Imperial Court, see the analysis by Bönnemann, *Verfassungskonflikten*, pp. 110-14.

that flowed from the newly introduced tariffs. The state governments and most of the parliamentary parties were unwilling to leave the entire surplus to the federal executive. While the state governments wanted to preserve the financial dependence of the Reich on the states, the *Reichstag* feared that granting the federal executive an independent financial basis could encroach upon the budgetary powers of the parliament. At the suggestion of the whip of the Centre Party, Georg Arbogast von und zu Franckenstein, the *Bundesrat* and the *Reichstag* eventually introduced a system of redistribution – as we have seen in Chapter 3 – that limited the amount of revenue from federal customs and duties payable to the Reich to 130 million marks; everything beyond that would go to the states.¹⁰⁶

This so-called Franckenstein Clause violated the constitution not in one, but in three ways. First, it divided the revenue from customs and duties between the different levels of government, even though the constitution determined that it had to flow to the federal treasury.¹⁰⁷ Second, it supplied the states with a surplus from sources that actually had to be used for the federal budget.¹⁰⁸ Third, it continued a system of financial redistribution between the Reich and the states that the constitution had designated as a provisional practice.¹⁰⁹

It is worth noting that this grossly unconstitutional law was proposed by an MP rather than one of the state governments, because this fact shows that not only monarchical, but also parliamentary actors felt free to compromise the constitution if it served political interests. This readiness on all sides to adopt unconstitutional laws could have momentous consequences. As the Franckenstein Clause capped federal revenues from customs and duties, it kept the Reich financially dependent on the states for many years and prevented the gradually emerging national government from profiting fully from the staggering growth that set in after the end of the economic depression in 1896. After the turn of the century, this

¹⁰⁶ *Gesetz, betreffend den Zolltarif des Deutschen Zollgebiets und den Ertrag der Zölle und der Tabacksteuer*, 15 July 1879, RGBl. (1879), no. 27, § 8, p. 244.

¹⁰⁷ RV (1871), art. 38.

¹⁰⁸ *Ibid.*, art. 70.

¹⁰⁹ *Ibid.* On these violations of the constitution, see Rosenau, *Hegemonie und Dualismus*, p. 101.

situation led to a squeeze on the federal budget that made many senior members of the General Staff and the War Ministry so nervous about Russia's and France's military expansion, as Niall Ferguson has demonstrated, that they hoped war would come sooner rather than later and that they were willing to contemplate a pre-emptive strike before the financial constraints of the Reich would make Germany incapable of defending herself.¹¹⁰ The adoption of a law that violated the basic financial provisions of the constitution thus created conditions that directly contributed to the outbreak of World War I. It is hard to imagine the lack of judicial review giving rise to a more dramatic consequence.

However, the Franckenstein Clause was rather unusual. Most federal laws did not strengthen, but weakened the position of the states. In the absence of a constitutional court, even the most basic constitutional provisions about Germany's federal nature were not immune from political compromises. This lack of protection proved fatal for the independence of the states. After the *Bundesrat* had been brought under the control of the federal administration, the state governments no longer played a central role in the national decision-making process. Federal legislation now depended solely on what the national parliament and the different federal departments around the Chancellor agreed upon. These unitary bodies usually cared little about the genuine interests of the states. This was particularly true for the *Reichstag*. Except for the confederate Centre Party and the Conservatives, all major parties had a one-sided national orientation, because it was much easier to hold the government of a centralised state responsible. From this perspective, it seems that the adoption of laws that undermined the constitutionally guaranteed status of the states was part of the strategy that the parties pursued in order to bring about parliamentary government.

However, the most obvious infringement of the federal constitution actually happened on the initiative of the executive rather than of the parliament: the gradual expansion of the

¹¹⁰ Niall Ferguson, 'Public Finance and National Security: The Domestic Origins of the First World War Revisited', *Past and Present* 142 (1994): 141–68.

federal ministerial apparatus, an institution that according to the constitution should never have existed. The creation of new federal agencies was an exclusive right of the *Bundesrat*.¹¹¹ But most of the new *Reichsämtter* – such as the *Kanzleramt*, the Federal Treasury, and the Federal Department for Postal Affairs – were founded by way of decrees (see Table 3 in Chapter 3) that the Emperor issued as head of the federal administration.¹¹² As the *Bundesrat* had no say in this process, such decrees lacked any constitutional basis. Nevertheless, the *Reichstag* approved them tacitly. The reason was simple: the smooth creation of a growing number of individual ministries was a big step toward the introduction of parliamentary government.

The expansion of the federal administration was only one field of many where the federal executive and the *Reichstag* reached political compromises at the expense of the states. In fact, this became the rule rather than exception after Bismarck's resignation. The laws that thus came into being routinely violated the constitution not only by disregarding the federal character of the union, but also by dissolving power-dividing structures more directly. The fiscal laws of the 1900s and 1910s, which Chapter 3 has examined, are a case in point. The reform of the inheritance tax, the introduction of a capital gains tax, and other measures not only infringed upon the constitutionally guaranteed monopoly of the states on direct taxation, but – as a result – also diminished the importance of the old confederate system of subsidy payments from the states, thus greatly reducing the influence of the state governments in national-decision-making.

As the example of the fiscal reforms illustrates, the adoption of unconstitutional laws led to a gradual erosion of the federal order. From this perspective, the lack of judicial review was a central structural precondition for the centralisation that Germany underwent. If there had been a constitutional court with the power to annul legislative measures that violated the

¹¹¹ RV (1871), art. 7.2.

¹¹² On this issue, see Rudolf Morsey, *Die oberste Reichsverwaltung unter Bismarck 1867-1890*, Neue Münstersche Beiträge zur Geschichtsforschung 3 (Münster: Aschendorff, 1957), especially p. 313.

rights of the states, Germany would probably have remained a decentralised union – a scenario that would have changed the course of both German and international history.

This consideration highlights the importance of the union's peculiar system of conflict resolution for the development of imperial politics. What made this impact so problematic was that in the tense atmosphere of the struggle between monarchical and parliamentary forces, the replacement of legal with political mechanisms of dispute settlement, the absence of an institution with the power to delimit competences, and the lack of judicial review could turn any legal issue into a question of power. This politicisation of legal problems gradually undermined the constitution to the point where it no longer provided a stable framework of rules and procedures. The constitution lost its stability-enhancing function, with the consequence that it could not guarantee the federal organisation of Germany.

The clearest symptom of this problem was that even allegedly insignificant legal problems regularly developed into conflicts that called the continued existence of the whole federal order into question. A case in point is the 1880 dispute between Prussia and Hamburg over the integration of St. Pauli and Altona, two districts of the Hanseatic city, into the German customs area.¹¹³ While the Prussian government based a motion to this effect on the right of the *Bundesrat* to define Germany's custom's frontier, the Hamburg Senate argued that a forced accession to the customs union would violate its constitutionally guaranteed right to a free harbour.¹¹⁴ In order to determine which of these arguments had priority, Hamburg proposed appealing to the Constitutional Committee of the *Bundesrat*, a body that had largely been inactive since unification.¹¹⁵

For Bismarck, the Committee 'had always been a *bête noire*', as the Bavarian *Bundesrat* plenipotentiary Hugo von und zu Lerchenfeld-Köfering observed, because he saw any institution that could potentially evolve into a constitutional court as a threat to Prussian

¹¹³ On this case, see Binder, *Reich*, pp. 134-40; Goldschmidt, *Kampf*, pp. 73-7, 276f.; and Rosenau, *Hegemonie und Dualismus*, pp. 58-60.

¹¹⁴ RV (1871), art. 7.2, 34. For the Prussian motion, see *Drucksachen (DR)*, 1880, vol. 2, no. 86.

¹¹⁵ See *Drucksachen (DR)*, 1880, vol. 2, no. 90.

hegemony and monarchical power.¹¹⁶ He thus made every effort to prevent the creation of a precedent that would give the Committee the right to interpret the constitution. His basic strategy was to put the state governments in the *Bundesrat* under so much pressure that they would refrain from referring the case to the Committee. For this purpose, he not only threatened them with his resignation, but also attacked them more directly.¹¹⁷ After a Bavarian plenipotentiary had proposed adjourning the negotiations, Bismarck used an official dinner party as an opportunity to insult him so severely that he was forced to abandon his post the next day.¹¹⁸ When the Lippe government still continued to oppose the Chancellor, he instructed the Prussian envoy in Detmold, the capital of the small principality, to remind the local ministers that ‘one day it will be payback time’.¹¹⁹

Bismarck’s sharpest weapon, however, was the threat that Prussia could leave the union. He reminded the Constitutional Committee of Prussia’s withdrawal from the German Confederation by declaring that ‘a situation could arise for Prussia similar to the one she faced in the *Bundestag* in June 1866’.¹²⁰ In order to underline the seriousness of this threat, he ordered the Prussian envoys at the German courts to warn the state governments that if they rejected Prussia’s motion in the *Bundesrat*, this decision would violate the constitution, annul the unification treaties, and dissolve the union.¹²¹

Driven by the fear that they might lose Prussia as their protecting power, the state governments eventually gave in and refrained from referring the case to the Committee. In the end, the conflict was resolved by a political compromise rather than a legal decision. While Altona joined the German customs area, St. Pauli remained a part of Hamburg’s free

¹¹⁶ [‘rotes Tuch’] Quoted in Binder, *Reich*, p. 135.

¹¹⁷ On Bismarck’s threat of resigning in this context, see Goldschmidt, *Kampf*, p. 74.

¹¹⁸ For the details of this episode, see Binder, *Reich*, pp. 136–41.

¹¹⁹ [‘Der Zeitpunkt uns dessen zu erinnern, wird gelegentlich eintreten.’] Bismarck’s letter to the Prussian envoy in Oldenburg Prinz zu Ysenburg, 9 May 1880, printed in Goldschmidt, *Kampf*, p. 276.

¹²⁰ [‘daß daraus für Preußen eine Lage entstehen könne wie diejenige, in der es sich im Juni 1866 im Bundestag befand’] Quoted in Poschinger, *Bundesrat*, vol. 4, p. 227 and in Binder, *Reich*, p. 136.

¹²¹ See Bismarck’s letter to the Prussian envoy in Oldenburg Prinz zu Ysenburg, 9 May 1880, printed in Goldschmidt, *Kampf*, p. 276.

harbour.¹²² The striking feature of the whole process that brought this decision about was that Bismarck's threat did not provoke any major protest. This lack of dissent shows that a potential dissolution of the union was not only an effective means of applying political pressure, but also a contingency whose plausibility was widely accepted. It was commonly understood that the federal organisation of Germany was a subject-matter just like any other and could thus be modified or even abolished in the course of any conflict. There was no guarantee of Germany's federal nature, then, because the dissolution of the union was not a taboo. Rather, it was seen as a measure of last resort that could legitimately be applied in order to decide a constitutional dispute.

For obvious reasons, this understanding was particularly important for the monarchical governments and their fight against growing parliamentary influence. The idea that the federal constitution depended on the unification treaties could easily be manipulated for the protection of monarchical power. Bismarck was most outspoken about this strategy when his authority crumbled in spring 1890. After the federal elections of that year, in which his *Kartell* coalition lost the majority and the Social Democrats became the strongest party in terms of the popular vote, his relationship with the majority parties in the *Reichstag* had become so difficult that he was about to lose the confidence of the new Emperor William II. In this situation, the Chancellor saw no other option but to propose a coup d'état that would eliminate the *Reichstag*.¹²³ Before the Prussian cabinet, he elaborated on his old argument that Germany was a union of princes rather than states. As the monarchs had concluded the unification treaties, he maintained, they also had the right to terminate them and to thus dissolve the federation. In order to do so, the Prussian king could abdicate as German Emperor and – together with all the other princes – withdraw from the treaties. After that,

¹²² *Protokolle (DR)*, 1880, session 26, 22 May, § 369, p. 266.

¹²³ On Bismarck's plans for a coup d'état, see Michael Stürmer, 'Staatsstreichgedanken im Bismarckreich', *HZ* 209, no. 3 (1969): 566–615 and Egmont Zechlin, *Staatsstreichpläne Bismarcks und Wilhelms II. 1890-1894* (Stuttgart & Berlin: Cotta, 1929). On the wider federal context, see Binder, *Reich*, pp. 156-63 and Goldschmidt, *Kampf*, pp. 75, 91f.

Bismarck pointed out, the princes could found a new pan-German state that would either not establish a national parliament at all or, if it did, would equip the popular assembly with much fewer rights than the *Reichstag*.¹²⁴

The growing rift between the Kaiser and the Chancellor, which led to the latter's resignation two weeks later, prevented this plan from being implemented. However, already the fact that Bismarck and the Prussian cabinet considered this coup d'état a serious option shows that the lack of well-defined legal channels for the resolution of constitutional conflicts – in particular between the monarchical executives and the parliaments – was crucial to the collapse of the union. As the few structures that existed for the settlement of such disputes had distinctly political origins, they could not shield the federal order from the widespread reservations against it. Any conflict could thus put the federal nature of Germany up for discussion. These circumstances greatly facilitated the gradual implosion of the federal order and paved the way for Germany's transformation into a centralised state.

¹²⁴ Protocol of the Prussian State Ministry, 2 March 1890, printed in Zechlin, *Staatsstreichpläne Bismarcks und Wilhelms II. 1890-1894*, pp. 180ff.

Figure 17: Liberal and Monarchical Concepts of *Bundestreue*

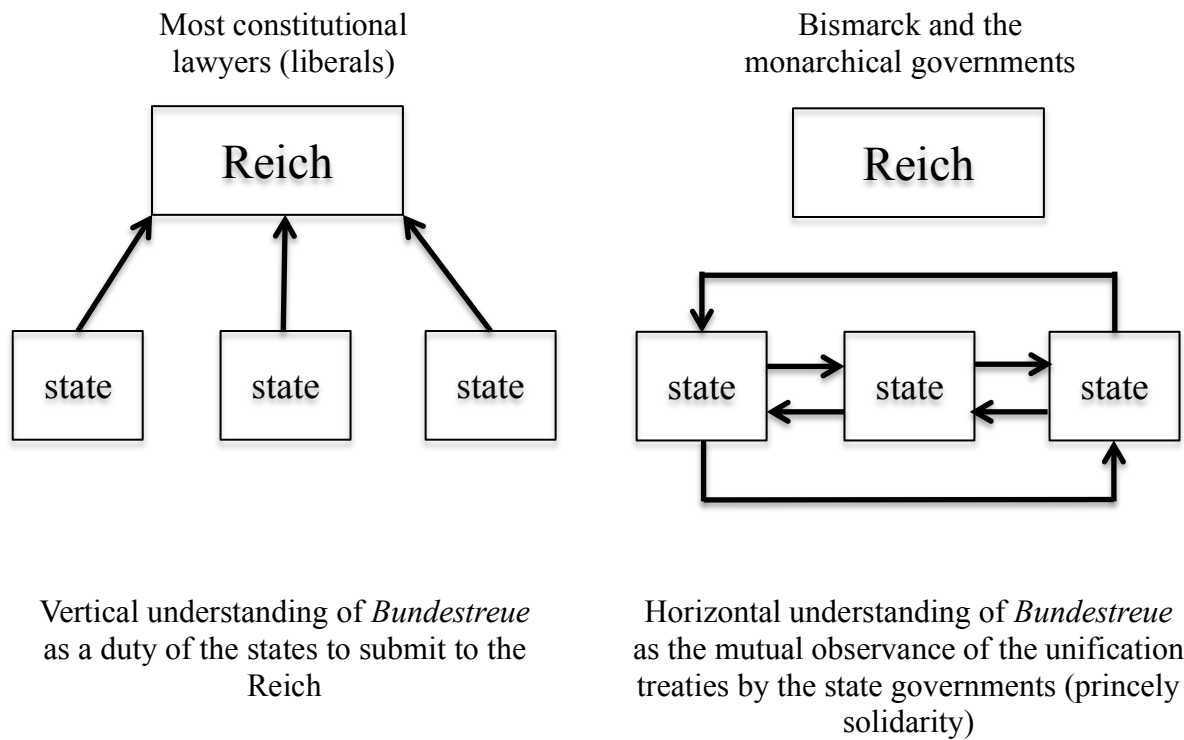
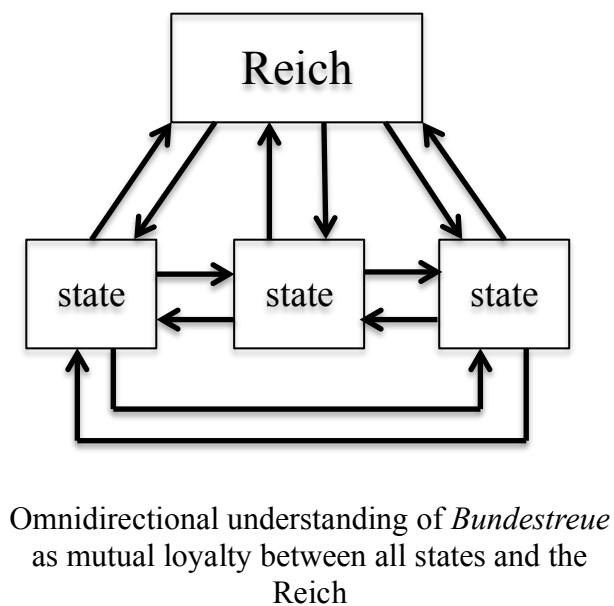


Figure 18: Rudolf Smend's Concept of *Bundestreue*, 1916



CONCLUSION



Picture 4: Niederwalddenkmal in Rüdesheim



Picture 5: Equestrian statue of William I in Koblenz



Picture 6: Crests of the German states on the plinth of the Germania statue (Niederwalddenkmal)



Picture 8: German Corner (*Deutsches Eck*) in Koblenz



Picture 8: Inscription above the main entrance of the Reichstag

Along the Rhine, the most German of all rivers, there are two great monuments to national unification. In the vineyards above Rüdesheim, a small town close to Mainz, a 38-meter high figure of Germania – the female personification of the German nation – commemorates the successful campaign against France and the foundation of the Empire in 1870/71 (see Picture 4). Seventy kilometres to the north, where the Mosel river joins the Rhine at Koblenz, the post-war reconstruction of a similarly imposing equestrian statue of William I has been converted into a memorial to the 1989/90 reunification and the victims of German partition (see Picture 5).

Originally built between the 1870s and 1890s, the two monuments are prime examples of the propagation of German nationalism in the imperial era. Flanked by the angels of war and peace, Germania holds the recovered crown of the emperor in her right hand, while resting her left hand on the Imperial Sword. Beneath her, a large bronze relief shows the nation's baptism of fire: the departure of the Prussian king and his allies to the battlefield. This scene is further emotionalised by an engraving of the anti-French patriotic anthem 'Watch on the Rhine'.¹ The Koblenz memorial too shows 'William the Great', as a large inscription says, riding into battle. He is accompanied by a female angel who carries the imperial crown and a laurel wreath. Directly beneath the Emperor, an ornamental frieze quotes the final verse of the poem 'Spring Greetings to the Fatherland', which the local poet Max von Schenkendorf composed during the Wars of Liberation: 'Never shall the Reich be destroyed, so long as you are one and loyal!'²

The two monuments convey an image of the Empire as a national monarchy characterised by military strength, cultural superiority, and political unity. But they also point to a feature that is overshadowed by all the imperial pomp, namely Germany's federal nature. Germania

¹ Max Schneckenburger, *Die Wacht am Rhein*, 1840. On the anthem, see the contemporary account by Georg Scherer and Franz Lipperheide, eds., *Die Wacht am Rhein, das deutsche Volks- und Soldatenlied des Jahres 1870: mit Portraits, Facsimiles, Musikbeilage, Uebersetzungen etc* (Berlin: Lipperheide, 1871).

² ['Nimmer wird das Reich zerstöret./ Wenn ihr einig seid und treu!'] Max von Schenkendorf, *Frühlingsgruß an das Vaterland*, 1814.

stands on a plinth that is decorated with the crests of the different German states (see Picture 6). The nation rests on a union of states that was formed in the war against France – this is the message of the overall composition of the monument. The federal dimension of Germany is just as central to the reconstruction of the German Corner (*Deutsches Eck*) in Koblenz. After the statue of the Emperor was destroyed at the end of the Second World War, the first president of the Federal Republic, Theodor Heuss, had it replaced by a German flag that flew over the remains of the socle as a memorial to German unity. In order to further underline this change of function, the crests of the German states, including those of the former East-Elbian territories, were installed around the ruin. When East and West Germany reunited in 1990, the memorial became obsolete. Remodelling started on the very same day the reunification treaties were signed. The crests of the five East German states were added to the others and three concrete chunks of the Berlin Wall were installed next to them. Following controversial discussions, a replica of the equestrian statue – donated by a local publisher – was re-erected in 1993, on the anniversary of the Battle of Sedan. A few years later, the plaza was surrounded along the riverside by a big national tricolour and the flags of the sixteen German states (see Picture 7). After this sophisticated redevelopment, the entire area appears today as a complex ensemble of memorial culture that comes to terms with Germany's long history of empire, division, and war by emphasising regional diversity rather than national homogeneity.³

When facing the two monuments, it is easy to overlook these references to Germany's federal nature. The imposing features of the memorials are the towering figure of Germania

³ On the Niederwaldenkmal in Rüdesheim, see Reinhard Alings, *Monument und Nation: das Bild vom Nationalstaat im Medium Denkmal: zum Verhältnis von Nation und Staat im deutschen Kaiserreich 1871-1918* (Berlin: De Gruyter, 1996), pp. 167ff.; Hans A. Pohlsander, *National Monuments and Nationalism in 19th Century Germany* (Oxford: Lang, 2008), chapter 7, especially pp. 160ff.; and Lutz Tittel, *Das Niederwalddenkmal: 1871 - 1883* (Hildesheim: Gerstenberg, 1979). On the German Corner in Koblenz, see Heinz Peter Volkert, *Das Kaiser-Wilhelm-Denkmal am Deutschen Eck in Koblenz*, 2nd ed. (Koblenz: Görres, 1993); Marco Zerwas, *Lernort 'Deutsches Eck'. Zur Variabilität geschichtskultureller Deutungsmuster* (Berlin: Logos, 2015); and Bill Niven, 'The Legacy of Second Empire Memorials after 1945', in *Memorialization in Germany since 1945*, ed. Bill Niven and Chloe Paver (New York: Palgrave Macmillan, 2009), 399–408. On both monuments, see Klaus Bemann, *Deutsche Nationaldenkmäler und Symbole im Wandel der Zeiten* (Göttingen: MatrixMedia, 2007), chapters 10-11.

and the equestrian statue of William, two symbols of national strength, imperial might, and the Empire's claim to power after the heroic age of unification. This prioritisation is no coincidence. Throughout the lifetime of the Empire, its federal organisation was at the mercy of power interests.

The Anatomy of Power

The struggle between monarchical and parliamentary power, this thesis has argued, was the driving factor behind Germany's gradual transformation from a decentralised union into a centralised state. It was the struggle for and against the introduction of parliamentary government that determined the course of federal evolution. More clearly than anywhere else, this relationship is reflected in the decoration of the most famous building of the imperial era: the *Reichstag* in Berlin. Above the main entrance, the façade is adorned with a frieze that reads 'Dem Deutschen Volke' – 'For the German people' (see Picture 8). This inscription was installed only in 1916, more than twenty years after the parliamentary palace had been built. The reason for this delay was the opposition of the Emperor. William II despised the epigram, because it evoked notions of popular sovereignty. He preferred the alternative 'Der Deutschen Einigkeit' – 'For German Unity'. By referring to the states rather than people, this formulation expressed the sovereignty of the princes. Over two decades, politicians and public commentators engaged in a fierce debate. It was the world war that eventually brought about a decision. In order to appease the growing dissatisfaction with the imperial monarchy, several officials urged William to change his mind. One day after the Kaiser had given in, the democratic motto was added to the façade. Its installation marked not only the breakthrough of parliamentary government, but also the collapse of the old federal order.⁴

⁴ On the history of the inscription, see Michael S. Cullen's book *Der Reichstag - Parlament, Denkmal, Symbol*, 2nd ed. (Berlin: be.bra, 1999), pp. 44-6 and his essay "'Still zu erledigen". Die Inschrift am Reichstagsgebäude', in 'Dem Deutschen Volke'. *Die Geschichte der Berliner Bronzegießer* Loevy. *Katalog*

As one of the most eye-catching features of the *Reichstag* building, the frieze is a powerful reminder of how closely the dissolution of federal structures was intertwined with the emergence of parliamentary government. The development of the federal state was the basic framework of the Empire's political history. Not everything was about federal evolution; but federal evolution was about everything.

This dissertation has shown that the Germany that fought the First World War was fundamentally different from the Germany that had been founded in 1871. Over the four and a half decades in between, the Empire changed from a rather confederate union that did not even feature a national government into a centralised state that was shaped by the cooperation and competition of the federal administration and the *Reichstag*. The course of this development was complex. The states lost more and more competences to the national level. Prussia ceased to determine the direction of German politics. The Prussian executive became completely dominated by its federal counterpart, which reduced the former hegemon to an instrument of national government. Unification did not mark the greatest triumph, but the approaching death of Prussia. The monarchical state governments, under Bismarck the prime movers of federal government, became marginalised by the increasing interaction between the federal administration and the parliament. They eventually sank into insignificance when the Chancellor stopped being their spokesman. He became instead the centre of a comprehensive government bureaucracy that practically formed an imperial cabinet, which the *Reichstag*

zur *Ausstellung im Jüdischen Museum Berlin*, ed. Helmuth F. Braun (Cologne: Dumont, 2003), 98–115. See also Neil MacGregor, *Germany. Memories of a Nation* (London: Penguin, 2016), p. 547. In the twenty-first century, the inscription has become subject to a new controversy. As it suggests that the nature of the people in Germany is homogenously German, various politicians have suggested removing it, including the former Federal President Roman Herzog. In 2000, the parliament invited the conceptual artist Hans Haacke to install an alternative inscription in one of the interior courts of the *Reichstag*. His slogan 'Der Bevölkerung' – 'For the Population' – dedicates the parliamentary building to all people living in Germany, regardless of their citizenship. See the official description on the website of the *Bundestag*, 'Hans Haacke. Projekt "Der Bevölkerung" im Reichstagsgebäude', <http://www.bundestag.de/besuche/kunst/kuenstler/haacke/> (first retrieved 10 April 2017) and the interview by Vera Stahl, 'Hans Haacke: "Der Reichstag ist ein imperialer Palast"', *SPIEGEL ONLINE*, 12 September 2000, <http://www.spiegel.de/kultur/gesellschaft/hans-haacke-der-reichstag-ist-ein-imperialer-palast-a-92860.html> (first retrieved 10 April 2017). On the meaning of the inscription for the notion of 'the people', see the article by the President of the German Parliament Norbert Lammert, 'Wer sind wir?', *Frankfurter Allgemeine Zeitung*, 4 January 2017, available online <http://www.faz.net/aktuell/politik/inland/lammert-ueber-identitaet-wer-sind-wir-14604613.html> (first retrieved 10 April 2017).

managed with ever-greater success to hold responsible. The position of the Kaiser improved greatly. Originally merely the *primus inter pares* among the German princes, he grew into a national monarch who had the power to intervene in the federal decision-making process. In short: the Reich evolved from a weak and underdeveloped federation that depended on the states and had merely coordinating functions into a mighty, centralised great power that possessed a fully-fledged executive apparatus, featured an increasingly self-confident national parliament, and had at its disposal the entire political, economic, and military resources of the nation.

What was special about this development? How does the evolution of the imperial union compare to that of the two other great federal states of the nineteenth-century, the United States and Switzerland? This conclusion cannot offer a full-scale comparison; such an analysis would be a book in its own right. What it can do, however, is point out some of the main differences. Most fundamental among these was the monarchical rather than republican nature of Germany. The Empire was the only union that faced the challenge of combining monarchical and federal government – and it failed utterly. Even Bismarck, the master of statecraft, did not find a working formula that managed to reconcile monarchical sovereignty – which, by definition, was inseparable – with the power-dividing nature of a federal state. His attempt to make the organisational paradox of a federal union of sovereign princes work was unsuccessful. The federal structures he created and the monarchical form of government they were designed to protect started dissolving as soon as the ink under the constitution was dry. Already before the outbreak of the world war, the federal order had largely imploded. The ‘mission’ that the legal historian Georg Waitz had defined for Germany after the 1848 revolutions, namely ‘to develop the constitutional monarchy in the form of a federal state’, turned out to be impossible.⁵

⁵ [‘Beruf [...] die konstitutionelle Monarchie in der Form des Bundesstaates zu entwickeln’] Georg Waitz, “Das Wesen des Bundesstaates. Reden und Betrachtungen von J. v. Radowitz,” *Allgemeine Monatsschrift für Wissenschaft und Literatur*, 1853, 494–530, printed in Fenske, *Reichsgründung*, no. 18, p. 91.

In fact, the monarchical nature of the federal order was the main reason for its disintegration. The transformation of Germany into a centralised state came about, this thesis has argued, because both monarchical and parliamentary actors – above all the Prussian government, the federal bureaucracy, and the *Reichstag* – saw the federal order primarily as an instrument that they tried to manipulate for their own purposes, namely for either the preservation of princely prerogatives or the expansion of parliamentary rights. Federal evolution was driven by power interests rather than by law and constitutionality. In order to achieve political goals, federal structures were modified, twisted, or even abolished without much ado.

The princely governments considered Germany's federal organisation merely a device for the protection of monarchical sovereignty. They agreed to unification only because it set up a structural framework that secured their power to the greatest extent possible in a national state. For the same reason, the *Reichstag* understood the federal structures of the constitution as the main obstacle to the introduction of parliamentary government. The status of the *Bundesrat*, in particular, shielded the Chancellor and the federal administration from parliamentary control. Under the impression of the failure of the 1848 Frankfurt Constitution, however, the parliament decided to approve the constitution, first in 1867 and then again in 1871 – too great was the risk that there would never be a better chance of establishing a German nation state. While the state governments and the *Reichstag* thus looked at the federal system from two completely different angles, both saw it as a necessary evil.

Attitudes toward federalism were fundamentally different in the republican federal states. In America, federal organisation was widely considered a precondition for the protection of individual liberty. With a view to the founding period of the United States, the Chicago historian Alison LaCroix has characterised this 'federal ideology' as 'a belief that multiple independent levels of government could legitimately exist within a single polity, and that such

an arrangement was not a defect to be lamented but a virtue to be celebrated'.⁶ Even those Founding Fathers who preferred a more centralised order were convinced, as Alexander Hamilton put it in 1788, that 'the State governments possess inherent advantages, which [...] will forever preclude the possibility of federal encroachments'.⁷ In Switzerland, on the other hand, the power-dividing structures of the federal state were commonly respected because they guaranteed the peaceful coexistence of the different national, religious, and linguistic groups while preserving the country's political independence. The law professor and left liberal politician Wilhelm Snell, who had emigrated to Switzerland from Germany in the 1820s, described this capacity in 1859, eleven years after his adopted country had been transformed from a confederation into a federation: 'For a great people, the federal state [...] is the best form of a republic [because] it combines the individual development and active competition between small republics with the advantages of larger states, namely overall strength in the international arena and the possibility of joint national institutions at home'.⁸ Such genuine respect for federalism as an organisational principle that was beneficial per se never existed in Imperial Germany to any noticeable extent. Even the Centre Party, the most important advocate of federalism in the national parliament, had ulterior motives, namely the protection of the Catholic south against the Protestant north, in particular against the federal hegemon Prussia.

If we turn to more specific questions, we see that there were many structural and contextual differences that set Germany's federal evolution apart. Chapter 1 has shown that the Empire's unification was a rather problematic process. The foundation of a federal rather than confederate or unitary state lacked historical and intellectual legitimacy. Rather than

⁶ Alison L. LaCroix, *The Ideological Origins of American Federalism* (Cambridge/MA: Harvard University Press, 2010), p. 6.

⁷ Quoted in Warren L. McFerran, *Birth of the Republic. The Origin of the United States* (Gretna/LA: Pelican, 2005), p. 399.

⁸ ['Der Bundesstaat [...] ist die eigenthümlichste Form des repräsentativen Freistaates für ein großes Volk [weil] sie [...] die freieste individuelle Entwicklung und den regsamsten Wetteifer kleiner Republiken mit den Vortheilen größerer Staaten, namentlich mit einer tüchtigen Gesamtkraft nach Außen, und der Möglichkeit großer, gemeinsamer Nationalanstalten im Innern [verbindet]'] Anonymous, ed., *Naturrecht nach den Vorlesungen von Dr. Wilhelm Snell*, 2nd ed. (Bern: Huber & Comp, 1859), p. 235-6.

being the manifestation of a historical tradition or an underlying systemic principle, the imperial union was simply the lowest common denominator of the many diverging political forces involved in the unification process. The Swiss and American federations could draw on a much more powerful source of legitimacy: popular sovereignty. They were created as unions of peoples rather than states. Despite this difference, the unification process of all three countries shared one central feature: war. If we adopt a long-term perspective on American unification, we can even say that each federal order was founded or consolidated by means of a civil war, namely the Austro-Prussian War of 1866/67, the Swiss *Sonderbund* War of 1847, and the American Civil War of 1861-1866, respectively.

Chapter 1 has also shown that German unification left several structural birthmarks on the federal state. Among these, the hegemonic status of Prussia was probably most important. The American and Swiss unions were created as joint efforts of the popular representatives of multiple states rather than under the leadership of one dominant state government. As a result, the unification process of the two republican federal states made provisions that were meant to prevent the emergence of a hegemonic state and to guarantee general equality between the member states.⁹

It is important to note, however, that it was much easier to create a well-balanced union in the American and Swiss context than in Germany. As Chapter 2 has pointed out, the complex, often ambiguous constitution of 1867/71 was the product of Germany's constitutional development since the Vienna Congress. The failures of the federal constitutions that had been adopted during the 1848 revolutions and their aftermath – the drafts of the Frankfurt Assembly and the Erfurt Union – greatly overshadowed the constitutional negotiations two

⁹ Good examples are, on the one hand, the Northwest Ordinance of 1787s, which prevented the emergence of a hegemonic state in the American union by determining that the newly created Northwest Territory would be divided into several smaller states; and, on the other hand, the maintenance of some egalitarian measures of the Helvetic Era (1789-1803), in which the French revolutionary government had turned Switzerland into a unitary state. Among these measures, the abolition of the different political statuses of the states (*Kanton, Untertanengebiet, zugewandter Ort*) was particularly important. On these issues, see Hans Kristoferitsch, *Vom Staatenbund zum Bundesstaat?: Die Europäische Union im Vergleich mit den USA, Deutschland und der Schweiz*, Schriftenreihe Europainstitut Wirtschaftsuniversität Wien 27 (Vienna: Springer, 2007), pp. 58, 99ff.

decades later. In contrast, the constitutions of 1787 and 1848 created the first federal orders on American and Swiss soil, respectively. They were defined as counter projects to the Articles of Confederation and the old order of the Helvetic confederation, respectively. Hence, the two republican federal constitutions had the advantage of being less burdened by history than their German counterpart.

But there was another reason for the complexity of the imperial constitution: it was specifically designed, Chapter 2 has argued, to protect monarchical power. For this purpose, the constitution equipped the council of state governments, the *Bundesrat*, with executive, legislative, and judicial functions, thus making it the central organ of federal decision-making. The American and Swiss constitutions took exactly the opposite approach. Putting the republican ideal of the separation of powers into practice, they established a complex system of checks and balances between the different federal constitutional organs. Moreover, they made the republican form of government obligatory for all constituent states.¹⁰ The German constitution lacked such a homogeneity requirement. Rather than by legal rules, the monarchical federal state coordinated the different member states and the national level by safeguarding the homogeneity of the ruling elites. This arrangement implied that the federal order would implode, should the *Reichstag* manage to establish control over the national government.

Precisely this is what happened. Chapter 3 has demonstrated that based on the continuous growth of national competences the *Reichstag* gradually increased its influence to the point where the Chancellor and the newly emerged federal departments became dependent on it. Federalisation went hand in hand with parliamentarisation. In the course of this development, the functions of the federal organs completely changed. The United States and Switzerland, where parliamentary government was the central principle of the constitution, also saw waves

¹⁰ USC (1789), art. 4, sect. 4. SC (1848), art. 6.

of centralisation that reduced the role of the states and the cantons, respectively.¹¹ But their federal constitutional organs never experienced a reshuffle of functions similar in scale to that in Germany.¹²

One of the main reasons why this functional transformation came about, Chapter 3 has argued, was that there were no proper forums of communication. In the plenary assembly of the *Bundesrat*, the representatives of the states could not engage in an open exchange, because they were bound by the instructions of their home government. Until the last years of the world war, regular cabinet meetings of the Chancellor and the state secretaries did not take place. Nor was there an official framework for negotiations between the *Reichstag* and the federal administration. Due to this lack of institutionalised consultations between the different seats of power, they competed for influence in a totally uncoordinated way. The result was a permanent struggle over competences that made constitutional functions extremely volatile and greatly destabilised federal government. The United States and Switzerland did not have this problem, as they possessed adequate channels of communication. In the American Senate and the Swiss *Ständerat*, the representatives of the states could exchange views without restrictions. Regular cabinet meetings defined a coherent course of the different ministries. Parliamentary interrogations and policy briefs ensured that the federal government reached political compromises with respectively the House of Representatives and the *Nationalrat* according to systematic procedures.

¹¹ On the rapid growth of the administrative capacity of the national government after the Civil War, see Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis*, 2nd ed. (Oxford: Hart, 2015), pp. 23-7 and Ballard C. Campbell, *The Growth of American Government: Governance from the Cleveland Era to the Present* (Bloomington: Indiana University Press, 2014), chapters 1-2. In Switzerland, it was above all the total revision of the constitution in 1874 that brought about centralisation, in particular regarding the military and the unification of laws. See Alfred Kölz, *Neuere Schweizerische Verfassungsgeschichte. Ihre Grundlinien in Bund und Kantonen seit 1848* (Bern: Stämpfli, 2004), 599-626, especially pp. 610-22. For a good overview, see also Johann Jacob Schollenberger and Otto Zoller, *Das Bundesstaatsrecht der Schweiz: Geschichte und System*, 2nd ed. (Berlin: Springer, 1920), pp. 56ff.

¹² Among the American and Swiss constitutional organs, the most pronounced change of status pertained to the US president, who started as ‘chief clerk’ and then gradually took centre stage over the course of the nineteenth century. See Michael A. Genovese, *A Presidential Nation: Causes, Consequences, and Cures* (Boulder: Westview, 2012), chapters 3-4. A comparison of the rise of the president to that of the German Emperor would be an interesting book in its own right.

These official institutions made it unnecessary for the American and Swiss federal systems to rely on any of the auxiliary practices that the German union maintained in order to guarantee at least some degree of coordination, such as the exchange of diplomats among the constituent states. The diplomatic missions in Berlin were most important, because the envoys to the Prussian court usually also served as *Bundesrat* plenipotentiaries of their home governments. The *Bundesrat* granted the states a central role in the federal decision-making process. But their participation in the council could easily be manipulated. Chapter 4 has revealed that soon after unification a complex system of registration, substitution, and attendance became established that gave the federal administration full control over the Prussian bench and the voting behaviour of the small states. On this basis, the federal administration around the Chancellor turned the *Bundesrat* into a compliant instrument, with the result that the states lost their independent voice in national policy-making.

Such a disempowerment of the states was impossible in the United States and Switzerland. Here, the constitutions and different legislative acts fixed the composition and procedures of the bodies that represented state interest, the Senate and the *Ständerat*.¹³ But the two republican unions were not free of systemic manipulations either. In the American Senate, the excessive practice of extending the debate over proposed pieces of legislation – the so-called filibuster – delayed or entirely prevented the vote on many important proposals of the federal administration.¹⁴ The Swiss liberal party, the *Freisinn*, secured its political hegemony over the cantons and the union not least by gerrymandering.¹⁵ Yet, these manipulations were different in quality from the takeover of the *Bundesrat* by the federal government. The reduction of the

¹³ USC (1789), art. 1, sect. 3. SC (1848), art. 69-72.

¹⁴ On the history of filibustering, which until 1842 was also allowed in the House of Representatives, see Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: University of Chicago Press, 2010). Chapter 3 of Koger's study deals with the nineteenth century and is aptly titled 'The Escalation of Filibustering, 1789-1901'.

¹⁵ See for example Albert Tanner, 'Ein Staat nur für die Hablichen? Demokratie und politische Elite im frühen Bundesstaat', in *Etappen des Bundesstaates. Staats- und Nationsbildung der Schweiz, 1848-1998*, ed. Brigitte Studer (Zürich: Chronos, 1998), pp. 65ff.

council of state governments to a mere sanctioning machine violated the most basic principle of federal organisation, the participation of the states in national decision-making.

An institution capable of taking action against such an infringement of the law did not exist. The Empire did not possess a federal constitutional court. Chapter 5 has shown that the consequences of this defect were momentous, in particular in the context of the fight between monarchical and parliamentary power. Constitutional disputes between the states, the different levels of government, and the federal organs were decided by political negotiations, threats, and deals rather than by the legal mechanism of conflict resolution; the *Bundesrat*, the federal administration, the Chancellor, the *Reichstag*, and the Emperor constantly fought over unclear competences; and federal laws routinely violated the constitution. All this greatly contributed to the collapse of the union, most importantly because it bereaved the constitution of its central function, namely providing a stable framework of rules and procedures.

Problems of this kind did not befall the United States and Switzerland, because their constitutions were protected by powerful constitutional courts. Soon after the end of the eighteenth century, the American Supreme Court established itself as a co-equal branch of federal government, alongside Congress and the executive. The most important measure in this direction was the creation of the doctrine of judicial review under Chief Justice John Marshall. On the basis of this authority, the court gradually expanded the scope of federal government in order to adapt the union to the needs of the emerging national economy, while also protecting the rights of the states against excessive tendencies of centralisation.¹⁶ By thus balancing states' and national rights, the court played a central role in the further development of the union. It acted, as President Woodrow Wilson later put it, as a 'constitutional

¹⁶ On these issues, see the concise analysis by former Chief Justice William Rehnquist, 'The Supreme Court in the Nineteenth Century', *Journal of Supreme Court History* 27 (2002): 1–13. The literature on the evolution of the American Supreme Court and the relevant cases is too vast to cite even the most important works here. It must suffice to point the reader to one particularly good standard work, where additional literature can be found: Robert G. McCloskey and Sanford Levinson, *The American Supreme Court, Sixth Edition*, 6th ed. (Chicago: University of Chicago Press, 2016).

convention in continuous session'.¹⁷ The Swiss *Bundesgericht* was less prominent, but also expanded its power over the years. Under the 1848 constitution, it was restricted to matters of civil and criminal law, similar to the Imperial Court in Germany. As one of the key reforms of the revisions of the constitution in the 1870s, the *Bundesgericht* was made responsible for resolving constitutional conflicts about cantonal rights, federal competences, and the violation of civil rights. However, it never gained the right to review the constitutionality of federal statutes.¹⁸ The direct democratic system made it unnecessary to equip the court with this power. Now as then, any statute has to be made subject to a popular referendum if a certain number of citizens demand it.¹⁹ It is the people themselves that exercise review. This division of constitutional jurisdiction between the Swiss people and the Supreme Court proved very effective. Despite its sharp confessional, linguistic, and national divide, nineteenth-century Switzerland did not experience any major constitutional crisis after the end of the culture wars in the 1870s.²⁰

In light of these comparative considerations, we see that the evolution of the imperial federal state featured many structural and contextual peculiarities. Still, it is pointless to conclude that it constituted a special path. There was nothing like a German federal *Sonderweg*.²¹ The central argument with which David Blackbourn, Geoff Eley, and many other historians have disproved the concept of a *Sonderweg* applies equally to Germany's federal evolution, not least because the federal evolution itself formed an essential part of

¹⁷ Quoted in John R. Vile, *Constitutional Change in the United States. A Comparative Study of Constitutional Amendments, Judicial Interpretations, and Legislative and Executive Actions* (Westport: Praeger, 1994), p. 6.

¹⁸ On the evolution of the competences of the *Bundesgericht*, see Kölz, *Neuere Schweizerische Verfassungsgeschichte*, pp. 804f. SC (1999), art. 190, as amended by the *Bundesbeschluss* from 8 October 1999, makes it explicit that federal statutes – as well as international law – are binding on the Supreme Court. SC (1874), art. 89. SC (1999), art. 141.

²⁰ On the history of the Swiss Supreme Court, see: Arthur Haeffliger, 'Hundert Jahre Schweizerisches Bundesgericht', *Schweizerische Juristenzeitung* 71 (1975): 1–8; Eduard His, *Geschichte des neueren Schweizerischen Staatsrechtes*, vols. 2–3 (Basel: Helbing&Lichtenhahn, 1929–1938); Kölz, *Neuere Schweizerische Verfassungsgeschichte*, pp. 575–80; and Goran Seferovic, *Das Schweizerische Bundesgericht 1848–1874: die Bundesgerichtsbarkeit im frühen Bundesstaat* (Zurich: Schulthess, 2010).

²¹ On this issue from a cultural perspective that considers discourses on German federalism since the Holy Roman Empire, see the brief essay by Maiken Umbach, 'History and Federalism in the Age of Nation-State Formation', in *German Federalism. Past, Present, Future*, ed. Maiken Umbach (New York: Palgrave Macmillan, 2002), 172–88, especially pp. 63f.

Germany's twisted road to democracy: a developmental norm that would justify the characterisation as a *Sonderweg* never existed, neither in the Anglophone world nor anywhere else.²² Even the evolutions of the two great republican federal states of the nineteenth-century widely diverged from each other. The historical legacy federal unions had to come to terms with, the political challenges they had to address, and the economic, social, and cultural circumstances they had to deal with were so different that we cannot speak of any evolutionary norm or exception.²³

Rather than calling Germany's federal evolution a *Sonderweg*, it makes more sense to point out where most of its peculiarities came from. Unlike the developments of the Swiss and American systems, the evolution of the imperial federal state was primarily driven by the underlying struggle between monarchical and parliamentary actors. It was the character of the German union as an instrument of power – or, to be more precise, as a device for the protection of monarchical sovereignty against the introduction of parliamentary government – that made its foundation possible, propelled its transformation, and brought about its collapse. The history of the imperial federal state is thus an image of the Empire's anatomy of power.

This conclusion urges us to consider the broader impact of this history. What legacy did the federal evolution of Imperial Germany bequeath to the Weimar Republic and beyond? In other words, what influence did it have on the course of German history in the twentieth century?²⁴ In many ways, the federal state founded in 1919 was a deliberate departure from its

²² On this issue, see Hans Fenske, *Der moderne Verfassungsstaat. Eine vergleichende Geschichte von der Entstehung bis zum 20. Jahrhundert* (Paderborn: Schöningh, 2001), p. 528. On the *Sonderweg* debate and the relevant literature, see the overview I have provided in the Introduction.

²³ On the exceptional character of Switzerland's historical development, for example, see the detailed study by Jonathan Steinberg, *Why Switzerland?*, 2nd ed. (Cambridge: Cambridge University Press, 1996). On federalism, see especially pp. 48ff., 77ff., 254ff.

²⁴ On lines of continuity, see Gerhard Lehmbuch, 'Der Entwicklungspfad des deutschen Bundesstaats - Weichenstellung und Krisen', in *Föderalismus in historisch vergleichender Perspektive*, ed. Gerold Ambrosius, Christian Henrich-Franke, and Cornelius Neutsch, vol. 2 (Baden-Baden: Nomos, 2015), 327–70. Already Hans Boldt, 'Der Föderalismus im Deutschen Kaiserreich als Verfassungsproblem', in *Innere Staatsbildung und gesellschaftliche Modernisierung in Österreich und Deutschland 1867/71-1914*, ed. Helmut Rumpel (Munich: Oldenbourg, 1991), p. 40 has argued that the 'legacy of Imperial German federalism is one of the most interesting topics of modern German constitutional history' ['Erbschaft des Kaiserreichsföderalismus zu den interessantesten Themen der neueren deutschen Verfassungsgeschichte gehört'].

imperial predecessor. For obvious reasons, the historical role model for the constitution of the new republic was not the monarchical order of 1871, but the revolutionary draft of the 1848/49 Frankfurt Assembly.²⁵ Already in 1917, the left-liberal lawyer Hugo Preuß, who drafted the original proposal of the Weimar constitution, had argued that in order to establish republican government ‘individual reforms’ would no longer suffice. Rather, he pointed out, a ‘fundamental change of the [federal] system’ would be necessary.²⁶ According to this rationale, the constitution of the Weimar Republic established a federation that was very different from the imperial union: a unitary federal state. In the words of the famous jurist and political theorist Carl Schmitt, Germany became a ‘federal state without a confederate basis’.²⁷

The concrete structural lessons that the fathers of the Weimar constitution drew from the federal evolution of the Empire were manifold. Chief among them was the necessity of clearly defining Germany’s form of government in order to avoid that the struggle between monarchical and parliamentary forces would continue. At a time when a counterrevolution was still a real possibility, this measure was crucial. The constitution thus opened by declaring Germany a republic.²⁸ Putting this democratisation into practice, other significant provisions made the *Reichstag* the central organ of federal decision-making, replaced the Emperor as head of state by a powerful President who was directly elected by the people, and created the possibility of holding popular referenda.²⁹ Moreover, the constitution established a collegial national government that comprised the Chancellor and the ministers, all of whom were made responsible to the *Reichstag*.³⁰ In addition, the states were obliged to maintain republican

²⁵ On this issue, see Holste, *Bundesstaat*, pp. 281-90 and Werner Frotscher and Bodo Pieroth, *Verfassungsgeschichte*, 11th ed. (Munich: Beck, 2012), pp. 257f.

²⁶ [‘Einzelreformen’], [‘fundamentalen Systemwechsel’] Hugo Preuß, ‘Vorschläge zur Abänderung der Reichsverfassung und der preußischen Verfassung’, 1 September 1917, printed in Hans Fenske, *Wilhelm II.*, no. 150, p. 496.

²⁷ [‘Bundesstaat ohne bündische Grundlage’] Carl Schmitt, *Verfassungslehre* (Munich: Duncker & Humblot, 1928), p. 389.

²⁸ WRV (1919), art. 1.

²⁹ Ibid., art. 20-40, 41-51, 73-76.

³⁰ Ibid., art. 52-59.

constitutions and parliamentary governments.³¹ This homogeneity requirement made a reintroduction of monarchical regimes impossible and guaranteed a minimum degree of coordination between the state and national level, an element of stability that the Empire had gradually lost due to the lack of such a provision.

In order to prevent particularistic interests from paralysing national politics again, the council of states – which was renamed ‘Reichsrat’ – was greatly reduced in rank.³² While it lost all of its judicial functions, its legislative and administrative powers were severely curtailed.³³ In the legislature, it became inferior to the *Reichstag*. Not only did it lose the right to directly initiate legislation.³⁴ But its approval was no longer necessary for bills to enter into force. The *Reichstag* could overrule any veto by a two-thirds majority.³⁵ Even constitutional amendments no longer required a positive vote of the states.³⁶ The right to decree administrative ordinances, one of the key powers of the old *Bundesrat*, was now conferred upon the federal government.³⁷ Besides, the council was deprived of most of its influence over foreign affairs. It no longer decided matters of war and peace – which were now subject to federal legislation – and had to relinquish its right to sanction treaties to the *Reichstag*.³⁸

The internal structures and procedures of the council were changed too. Its meetings now had to be held in public and the states could only be represented by members of their governments.³⁹ These measures were intended to prevent a renewed manipulation of the council by the Prussian and federal government. For the same purpose, the dominance of the Prussian bench was greatly reduced. While the number of votes still depended on the

³¹ Ibid., art. 17.

³² On this demotion and the new internal structures and procedures of the council, see Holste, *Bundesstaat*, pp. 286f., 430-42.

³³ For the restriction of the council to participating in the legislature and administration of the Reich, see WRV (1919), art. 60.

³⁴ Ibid., art. 68.1, 69.

³⁵ Ibid., art. 74.

³⁶ Ibid., art. 76.2.

³⁷ Ibid., art. 77.

³⁸ Ibid., art. 45.2, 45.3.

³⁹ Ibid., art. 66.3, 63.1, first sentence.

population size of the states, no state could possess more than two-fifths of all votes.⁴⁰ Furthermore, half of the Prussian votes had to be cast by representatives of the different Prussian provinces, who were not bound to the instructions of the Prussian government.⁴¹

These restrictions effectively abolished Prussia's constitutional hegemony. In order to further diminish her influence and to thus prevent a resumption of the Prussian-federal dualism, the Prussian administration was separated from the federal bureaucracy. The latter became an independent institution. Taken together, all these new regulations replaced the old hegemonic constitutional order with a system in which all states enjoyed the same status and equal rights.⁴²

Vis-à-vis the national level, however, the states had a much weaker position than under the 1871 constitution.⁴³ In view of the great centralisation that the Empire had undergone, the Weimar constitution granted the Reich many more competences right from the beginning.⁴⁴ This change was most pronounced in the field of finance. While before 1919 the Reich had largely relied on subsidy payments from the states, it was now financially independent, most importantly because it gained the right to collect direct taxes.⁴⁵

The delimitation of competences that did not clearly belong to either the national or state level fell into the jurisdiction of the new national constitutional court, the *Staatsgerichtshof*. This body was created in order to ensure that constitutional conflicts would now be resolved by legal rather than political means and that the constitution would be better protected against power plays and pragmatic compromises.⁴⁶ Above all, the court was responsible for

⁴⁰ WRV (1919), art. 61.1.

⁴¹ Ibid., art. 63.1, second sentence.

⁴² See Helmut Klaus, *Der Dualismus Preussen versus Reich in der Weimarer Republik in Politik und Verwaltung*, Studien zur Kultur- und Rechtsgeschichte 3 (Mönchengladbach: Forum, 2006), chapters 2-3. For concise overviews, see Holste, *Bundesstaat*, p. 282 and Frotscher and Pieroth, *Verfassungsgeschichte*, p. 260.

⁴³ For a concise analysis of the distribution of competences between the states and the Reich, see Holste, *Bundesstaat*, pp. 283-7, 335-405.

⁴⁴ For the federal competence catalogue, see WRV (1919), art. 6-13, 78-101.

⁴⁵ Ibid., art. 8, 11.

⁴⁶ The creation of the court was based on ibid., art. 108 and the *Gesetz über den Staatsgerichtshof*, 9 July 1921, RGBl. (1921), no. 74, pp. 905-10.

constitutional disputes of a genuinely federal nature, namely for conflicts between the Reich and a state, quarrels between different states, and disagreements between the constitutional organs of those states that lacked an own constitutional court.⁴⁷ But it also dealt with charges that the *Reichstag* brought against the Chancellor, the ministers, or the President.⁴⁸

Structural innovations like the *Staatsgerichtshof* show that the fathers of the Weimar constitution considered the federal evolution of the Empire closely and that they tried to create a union that would not suffer from the same systemic problems. Nevertheless, the federal structures of the Weimar Republic were immature, open-ended, and easy to manipulate.⁴⁹ Just before the final vote on the constitution, the right-liberal Adelbert Düringer, a former judge at the Imperial Court in Leipzig, warned his colleagues in the National Assembly that

the major problems that have to be decided – federal state or unitary state, particularism or unitarism – are solved by the constitution in an insufficient and unsatisfactory manner; indeed they are not solved at all, rather the solution is postponed.⁵⁰

Commentators on both ends of the political spectrum came to the same conclusion. Carl Schmitt, who later supported the Nazis, spoke of ‘dilatatory compromises of a formalistic nature’.⁵¹ In 1930, the young socialist lawyer Otto Kirchheimer, who later emigrated to the United States and became one of the most important constitutional theorists of the twentieth century, published the controversial essay *Weimar – and then what?*, in which he argued that the republic was unlikely to experience a healthy development because it was based on a constitution that made no decisions.⁵²

⁴⁷ WRV (1919), art. 19.1.

⁴⁸ Ibid., art. 59.

⁴⁹ Similar assessment by Holste, *Bundesstaat*, pp. 290-2.

⁵⁰ [‘Die großen zur Entscheidung stehenden Probleme: Bundesstaat oder Einheitsstaat, Partikularismus oder Unitarismus, sind in der Verfassung in ungenügender und unbefriedigender Art und Weise gelöst; sie sind überhaupt nicht gelöst, sondern die Lösung ist verschoben.’] Quoted in *ibid.*, p. 292.

⁵¹ [‘dilatorischen Formelkompromissen’] Schmitt, *Verfassungslehre*, pp. 31ff.

⁵² Otto Kirchheimer, ‘Weimar - und was dann? Analyse einer Verfassung (1930)’, in *Politik und Verfassung*, Edition Suhrkamp 95 (Frankfurt am Main: Suhrkamp, 1964). On p. 52 he speaks of a ‘constitution without

Such negative characterisations remind us that the Weimar constitution did not put the lessons from the federal evolution of the Empire consistently into practice. On the most fundamental level, this issue became manifest in the territorial organisation of Germany. Even though the constitution gave the Reich the right to restructure the federal territory, the constituent states of the imperial era, which had primarily been dynastic entities, were taken over without major changes.⁵³ The internal structure of Germany thus stayed largely the same – as did the problems that this territorial framework created.⁵⁴

This dilemma was most important in regard to Prussia. Even though Hugo Preuß and others made a strong case for breaking Prussia up into several middling states, her territory was left intact.⁵⁵ Despite the loss of her constitutional prerogatives, Prussia thus retained a hegemonic position, simply because she was by far the biggest political, economic, and cultural power among the states. Governing the Reich without the support of the Prussian government was still impossible.⁵⁶ Precisely this was the reason why in 1932 Chancellor Franz von Papen persuaded President Paul von Hindenburg to issue an emergency decree that dismissed the Prussian cabinet and put Prussia under the control of the national government.⁵⁷ The *Preußenschlag* was necessary in order to remove the last major force standing in the way of von Papen's plan for nationalist rule, namely the centre-left 'Weimar coalition' that governed Prussia under the social democratic prime minister Otto Braun. By depriving the hegemonic state of its independence, this coup d'état disempowered Germany's power-

decision' ['Verfassung ohne Entscheidung']. The comments by Schmitt and Kirchheimer can also be found in Holste, *Bundesstaat*, p. 292.

⁵³ WRV (1919), art. 19. Only a few territorial changes occurred at all. The two principalities of Reuss were merged during the revolution. Together with six other Thuringian small states they formed the new state of Thuringia in 1920, see *Gesetz, betreffend das Land Thüringen*, 30 April 1920, RGBL. (1920), no. 7483, pp. 841f. Coburg, formerly part of Saxe-Coburg-Gotha, joined Bavaria, see *Gesetz, betreffend die Vereinigung Coburgs mit Bayern*, 30 April 1920, RGBL. (1920), no. 7484, p. 842. In 1929, Waldeck was incorporated into Prussia, see *Gesetz über die Vereinigung von Waldeck mit Preußen*, 7 December 1928, RGBL. (1928), no. 42, p. 401.

⁵⁴ On the maintenance of Germany's territorial structure and its consequences, see Holste, *Bundesstaat*, pp. 293f.

⁵⁵ On the contemporary discussion, see *Ibid.*, pp. 276-8.

⁵⁶ Klaus, *Der Dualismus Preussen versus Reich in der Weimarer Republik in Politik und Verwaltung*, chapters 4ff.

⁵⁷ *Verordnung des Reichspräsidenten, betreffend die Wiederherstellung der öffentlichen Sicherheit und Ordnung im Gebiet des Landes Preußen*, 20 July 1932, RGBL. (1932), no. 48, pp. 377f.

dividing structure at a stroke and thus paved the way for the centralisation under Hitler. In a union that would have featured a concert of roughly equipollent states, no measure against a single state could have had the same impact.⁵⁸

With respect to the powers and relations of the federal constitutional organs, too, the Weimar constitution failed to leave some of the most severe problems of the imperial union behind. In fact, it often made matters worse. The President was much more powerful than the Emperor ever had been. When combined, his rights to dissolve the parliament and to issue emergency decrees gave the President quasi-dictatorial powers, which Hindenburg used in the 1930s to turn the republic into an autocracy.⁵⁹ In the overall structure of the constitution, these far-reaching powers created a dualism between the President and the *Reichstag* that was even more pronounced than the antagonism that had existed between the latter and the imperial government around the Chancellor. The resulting juxtaposition of the state with the people – represented by the President and the parliament, respectively – was incompatible with the democratic principle, because it implied that the state was a separate entity that did not necessarily need to serve the people. This dualism undermined the legitimacy of republican institutions in general and impeded the development of a democratic culture.⁶⁰

⁵⁸ On the *Preußenschlag* and its impact, see Jürgen Bay, *Der Preussenkonflikt 1932/33: ein Kapitel aus der Verfassungsgeschichte der Weimarer Republik* (Erlangen: Hogl, 1967); Ludwig Biewer, 'Der Preußenschlag vom 20. Juli 1932. Ursachen, Ereignisse, Folgen und Wertung', *Blätter für deutsche Landesgeschichte* 119 (1983): 159–72; Rudolf Morsey, 'Zur Geschichte des "Preußenschlags" am 20. Juli 1932', *Vierteljahreshefte für Zeitgeschichte* 4 (1961): 430–39; Karl Dietrich Bracher, *Die Auflösung der Weimarer Republik. Eine Studie zum Problem des Machtverfalls in der Demokratie*, 5th ed. (Düsseldorf: Droste, 1971), pp. 556–63; Dirk Blasius, *Weimars Ende: Bürgerkrieg und Politik 1930–1933*, 2nd ed. (Göttingen: Vandenhoeck & Ruprecht, 2005), pp. 68–78; Richard J. Evans, *The Coming of the Third Reich* (Penguin, 2004), pp. 285–7; and Gerhard Weiduschat, ed., *Ein Staatsstreich? Die Reichsexekution gegen Preußen. (Preußenschlag vom 20. Juli 1932 und die Folgen). Darstellungen und Dokumente*. (Berlin: Bundesrat, 2007).

⁵⁹ WRV (1919), art. 25.1, 48.1–2. On this issue, see Ludwig Richter, 'Reichspräsident und Ausnahmegehalt', *Der Staat* 37 (1998): 221–47; Achim Kurz, *Demokratische Diktatur?: Auslegung und Handhabung des Artikels 48 der Weimarer Verfassung 1919–25* (Berlin: Duncker und Humblot, 1992); and Wolfram Pyta, *Hindenburg: Herrschaft zwischen Hohenzollern und Hitler* (Munich: Siedler, 2007). For a good overview, see Dietmar Willoweit, *Deutsche Verfassungsgeschichte*, 6th ed. (Munich: Beck, 2009), pp. 298, 303–06.

⁶⁰ Bracher, *Die Auflösung der Weimarer Republik*, pp. 43–7 and Frotscher and Pieroth, *Verfassungsgeschichte*, pp. 265, 290ff. For a detailed study of this dualism and its practical problems, see Peter Haungs, *Reichspräsident und parlamentarische Kabinettsregierung: Eine Studie zum Regierungssystem der Weimarer Republik in den Jahren 1924 bis 1929* (Wiesbaden: Springer, 1968).

Another factor that nurtured the scepticism against the republic was the frequent change of federal governments. In the fourteen years between the end of the war and the National Socialist takeover, Germany witnessed no fewer than twenty different governments. The key problem was that the parliament could withdraw its confidence from the Chancellor and thus force him to resign without electing a successor.⁶¹ This destructive vote of no confidence gave the parties of the extreme right and left the chance to destabilise the republic from the opposition benches.⁶² The creation of this provision, which established parliamentary government in its purest form, can be seen as an act of overcompensation that originated in a lack of experience. For more than forty years, the federal structures of the Empire had prevented the emergence of an official framework of parliamentary responsibility. When the Weimar constitution was drafted, it was therefore largely unclear what arrangements were needed in order to guarantee the stability of a German parliamentary system.

In regard to other fundamental questions, the federal evolution of the Empire provided very clear advice. But the Weimar constitution ignored it. This problem was particularly obvious in the judiciary. One of the basic reasons for the systemic instability of the imperial union was the lack of an institution that could review the constitutionality of laws and resolve conflicts between the federal constitutional organs. Nevertheless, the Weimar constitution refrained from equipping the *Staatsgerichtshof* with these rights – a failure for which the republic paid a high price. When the Nazis gradually transformed the union into a unitary Führer state, there was no institution that could have declared the legislative measures that they adopted to this end – such as the annulment of the basic rights, the abolishment of the *Reichsrat*, or the Enabling Act – unconstitutional. As a result, the Nazis could present their

⁶¹ WRV (1919), art. 54, especially sentence 2.

⁶² On the destructive vote of no confidence, see the comparative reflections by Edmund Brandt, *Die Bedeutung parlamentarischer Vertrauensregelungen - Dargestellt am Beispiel von Art. 54 WRV und Art. 67, 68 GG* (Berlin: Duncker & Humblot, 1981) and Karl-Ulrich Meyn, 'Destruktives und konstruktives Mißtrauensvotum - von der schwachen Reichsregierung zum starken Bundeskanzler?', in *80 Jahre Weimarer Reichsverfassung - was ist geblieben?*, ed. Eberhard Eichenhofer (Tübingen: Mohr Siebeck, 1999), 71–94. See also the remarks by Heinrich August Winkler, *Weimar 1918 - 1933: die Geschichte der ersten deutschen Demokratie* (Munich: Beck, 1998), pp. 576f.

seizure of power as a lawful process. This strategic move was crucial in order to gain the support of the bureaucrats that run the state.⁶³

It was just as important for the Nazi takeover that the Weimar constitution – like its imperial predecessor – did not explicitly stipulate that Germany had to be organised federally. While the lack of such a definition had enabled Bismarck to defend monarchical sovereignty by representing the Empire as a confederation of princes, it greatly facilitated the monopolisation of power under the Nazi, because it permitted them to abolish the independence of the states by a series of legal acts, the so-called *Gleichschaltung* laws (see below).

The list of parallels of this kind could be continued much further. But this is unnecessary. The point here is that despite all the innovations and its unitary orientation, the Weimar constitution was, as its leading commentator Gerhard Anschütz put it, ‘not [...] the antithesis of the old [union], but [...] the next stage of development’.⁶⁴ His colleague Walter Jellinek underlined this view in 1920 when he pointed out that ‘the difference between today and the past is often overstated’.⁶⁵ The international lawyer and liberal politician Walther Schücking even argued that there was no more than one essential difference between the Weimar order and the Empire after the latter had introduced parliamentary government in October 1918, namely the ‘abolition of a purely decorative imperial head’.⁶⁶ In other words: Weimar did not represent a radical break with, but an evolutionary transformation of the imperial union.⁶⁷

⁶³ On the legality of the Nazi takeover and the importance of this question, see Irene Strenge, *Machtübernahme 1933: alles auf legalem Weg?*, Zeitgeschichtliche Forschungen 15 (Berlin: Duncker & Humblot, 2002) and the concise overview by Willoweit, *Deutsche Verfassungsgeschichte*, pp. 311f.

⁶⁴ [‘nicht [...] Antithese der alten [bundesstaatlichen Ordnung], sondern [...] geradlinige Fortbildung’] Gerhard Anschütz, ‘Der deutsche Föderalismus’, *VVDStRL* 1 (1924), p. 16.

⁶⁵ [‘Überhaupt wird der Unterschied zwischen heute und früher leicht übertrieben’] Walter Jellinek, ‘Revolution und Reichsverfassung’, *Jahrbuch des öffentlichen Rechts* 9 (1920), p. 81.

⁶⁶ [‘Abschaffung einer rein dekorativen kaiserlichen Spitze’] Walther Schücking, ‘Staatsrechtliche Reformbestrebungen und Reformen während der Kriegszeit’, in *Handbuch des Deutschen Staatsrechts*, ed. Gerhard Anschütz and Richard Thoma, vol. 1, 2 vols (Tübingen: Mohr, 1930), p. 95.

⁶⁷ See Holste, *Bundesstaat*, pp. 288-90, where he quotes the same comments by Anschütz, Jellinek, and Schücking.

Only the adoption of an entirely different form of organisation, such as for instance the decentralised unitary state that Hugo Preuß originally proposed, would have constituted a fresh start.⁶⁸ But the political spectrum of the revolutionary era was ideologically too divided for any consensus to emerge on a complete reorganisation of Germany. As a result, the Weimar federal state was a compromise between tradition and progress that faced opposition from two sides, while receiving little, if any support.⁶⁹ For the proponents of a unitary state – above all the Socialists, the left liberals, and later the Nazis – it was too federal. In contrast, the advocates of the states – regional politicians, separatists, monarchical revisionists, and other conservatives – considered it too unitary. This lack of support made the Weimar Republic a ‘restless federal state’ whose structural framework was too fragile to withstand the economic and political crises of the late 1920s and early 1930s.⁷⁰

These considerations suggest that in addition to its complex systemic legacy the federal evolution of the Empire had a distinct cultural impact. The purely pragmatic origin, the constant manipulations, and the gradual implosion of the imperial federal order produced a political culture that was characterised by a shortage of genuine respect for federal organisation. This negative attitude towards federalism was perhaps the most important legacy of the Empire’s federal evolution, because it shaped Germany’s structural development for most of the twentieth century.

In the Weimar National Assembly, there were very few voices that genuinely believed federalism to be a good form of organisation. Unitary views greatly dominated the discussion.

⁶⁸ See Hugo Preuß’ essays ‘Vorschläge zur Abänderung der Reichsverfassung und der preussischen Verfassung, nebst Begründungen (1917)’, ‘Begründung für den Entwurf einer Verfassung für das Deutsche Reich (1919)’, and above all ‘Denkschrift zum allgemeinen Teil der Reichsverfassung vom 3. Januar 1919 (1919)’, all printed in *Staat, Recht und Freiheit aus 40 Jahren deutscher Politik und Geschichte* (Hildesheim: Olms, 1964), 290–335, 394–421, 368–94. See also Günther Gillessen, *Hugo Preuss. Studien zur Ideen- und Verfassungsgeschichte der Weimarer Republik* (Berlin: Duncker & Humblot, 1955).

⁶⁹ On the nature of the Weimar constitution as a compromise, see the essays by Ernst-Wolfgang Böckenförde and Hans Boldt ‘Der Zusammenbruch der Monarchie und die Entstehung der Weimarer Republik’ and ‘Die Weimarer Reichsverfassung’, in *Die Weimarer Republik 1918–1933*, ed. Karl Dietrich Bracher, Manfred Funke, and Hans-Adolf Jacobsen, 3rd ed. (Bonn: Bundeszentrale für politische Bildung, 1998), pp. 37ff., 59 and Christoph Gusy, *Die Weimarer Reichsverfassung* (Tübingen: Mohr Siebeck, 1997), p. 78f. See also Holste, *Bundesstaat*, p. 291, where he refers to the same studies by Böckenförde, Boldt, and Gusy.

⁷⁰ [‘ruhelosen Bundesstaat’] Holste, *Bundesstaat*, p. 546, see also pp. 292f.

Most MPs considered a federal state less powerful and less democratic than a unitary system. That the assembly decided nevertheless to maintain Germany's federal structure had merely practical reasons.⁷¹ It was not only the simplest option, but also the only compromise the different ideological camps could agree on. It was just as important that in order to maintain law and order after the war, the new republican regime depended on the cooperation of the bureaucratic elites of the states. For obvious reasons, these were unwilling to surrender their power in favour of a unitary reorganisation of Germany.⁷² Moreover, it is doubtful that the victorious powers of the First World War would have accepted the creation of a centralised state. Such a concentration of power would have been incompatible with their objective of weakening Germany by the territorial losses, military restrictions, and reparations payments that the Versailles Treaty determined.

Since the National Assembly left Germany's federal structure intact only out of pragmatic motivations such as these, the adoption of the Weimar constitution did not equip the federal organisation of the country with any new or positive legitimation. Federalism was still widely seen as a necessary evil, albeit for different reasons than in imperial times. Even many adherents of a state-based system understood the federal union merely as an interim solution on the way to a 'German unitary state with autonomous provinces', as the Centre MP Ludwig Kaas put it.⁷³ No one expressed the common contempt for the federal division of the nation in more elegant terms than the celebrated author Erich Kästner, who was born in Saxony but lived in Berlin. In his 1932 poem 'Inscription on a Saxon-Prussian border stone', federalism got nothing but scorn and derision:

Passer-by, observe this border stone and sigh!
And ponder on a nation
Criss-crossed by walls invisible and high
Whose deeper sense is: mutilation.

⁷¹ See *ibid.*, pp. 290f.

⁷² *Ibid.*, pp. 270-3.

⁷³ ['deutscher Einheitsstaat mit autonomen Stammesländern'] Quoted in *ibid.*, p. 291.

This stone that you now look upon
Serves as a grave, and down below
Lie the dogs to which, it's said, the nation's gone.
Just in case you didn't know!⁷⁴

Based on such antipathies, the relations between the states and the Reich came under fire as soon as the constitution had entered into force. When the republic slithered into a presidential system at the end of the 1920s, the federal order was gradually eroded. The emergency decrees of the president made the *Reichsrat* practically superfluous and routinely infringed upon the rights of the states. This centralisation and the persistent propaganda for the creation of a strong unitary state tilled the soil for the *Preußenschlag* in 1932.⁷⁵ The ensuing judgment of the *Staatsgerichtshof* was perhaps the most distressing manifestation of the contempt in which the public elite held federal structures.⁷⁶ Citing formalistic reasons, the judges avoided a clear condemnation of the measure. This decision, which indirectly legitimised Papen's attack on Prussia, was the act of a politically naive judiciary that silently approved the erosion of Germany's federal structures, because these were not associated with freedom and the rule of law – too strong were the prejudices that had been inherited from the imperial era.

The low esteem in which federalism was held made it easy for the Nazis to abolish the power-dividing structures of the union and to replace them with a centralised system. According to National Socialist propaganda, the unitary Führer state was the governmental expression of the *Volksgemeinschaft* and the final triumph over the age-old fragmentation of the German nation, which the republic had artificially preserved.⁷⁷ The Nazis therefore lost no time in abolishing the remaining independence of the states. Only one week after the adoption

⁷⁴ ['Wer hier vorübergeht, verweile!/Hier läuft ein unsichtbarer Wall./Deutschland zerfällt in viele Teile./Das Substantivum heißt: Zerfall.'], ['Was wir hier stehengelassen haben./das ist ein Grabstein, dass ihr's wisst!/Hier liegt ein Teil des Hunds begraben./auf den das Volk gekommen ist.'] Erich Kästner, *Inschrift auf einem sächsisch-preußischen Grenzstein*, 1932, printed in *Gesang zwischen den Stühlen* (Zurich: Atrium, 2011), p. 36, translation by Christopher M. Clark.

⁷⁵ On these effects of the presidential dictatorship on the federal order, see Holste, *Bundesstaat*, pp. 355-8, 455-7, 547f.

⁷⁶ On the court decision, see Henning Grund, '*Preußenschlag*' und *Staatsgerichtshof* im Jahre 1932, *Studien und Materialien zur Verfassungsgerichtsbarkeit* 5 (Baden-Baden: Nomos, 1976).

⁷⁷ Albert Funk, *Kleine Geschichte des Föderalismus: vom Fürstenbund zur Bundesrepublik* (Paderborn: Schöningh, 2010), p. 286 and Klaus Hildebrand, *Geschichte des Dritten Reiches* (Munich: Oldenbourg, 2012), pp. 15f.

of the Enabling Law had brought them to power in January 1933, they reconstituted the state parliaments on the basis of the votes in the last *Reichstag* election, in which they had won a sizeable majority.⁷⁸ Another week later, they put the state governments under the permanent control of the Reich minister of the interior by installing local proconsuls, the so-called *Reichsstatthalter*.⁷⁹ In January 1934, the ‘law concerning the reconstitution of the Reich’ finished the job. By abolishing the state parliaments and reducing the local governments to merely administrative agencies, it turned the states into mere provinces and converted Germany into a centralised state.⁸⁰

In broad parts of the population, this centralisation was welcomed. Even circles that were otherwise critical of the National Socialists often saw the abolition of federal structures as something positive. An anonymous noblewoman later recalled in an interview:

Until Hitler came along, there were still different citizenships in Germany. My husband had Baden citizenship, not Prussian. There were Bavarians, Saxons, etc. [...] Hitler changed that. This was considered good. My husband always said: if there is one thing Hitler has managed to achieve, then it is the unity of the Germans.⁸¹

Such approving views provided the unitary Nazi state with popular legitimacy. The consequences were dreadful. It was Germany’s centralisation and the ensuing monopolisation of power that made the organisation of the Holocaust possible in the first place. A mass-

⁷⁸ *Gesetz zur Gleichschaltung der Länder mit dem Reich*, 31 March 1933, RGBl. I (1933), no. 29, pp. 153f.

⁷⁹ *Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich*, commonly called ‘Reichsstatthaltergesetz’, 7 April 1933, RGBl. I (1933), no. 33, p. 173.

⁸⁰ *Gesetz über den Neuaufbau des Reichs*, 30 January 1934, RGBl. I (1934), no. 11, p. 75. On this centralisation process, the so-called ‘Gleichschaltung der Länder’, see Martin Broszat, *Der Staat Hitlers. Grundlegung und Entwicklung seiner inneren Verfassung*, 2nd ed. (Munich: Deutscher Taschenbuch Verlag, 1971), chapter 4 and the relevant passages in Karl Dietrich Bracher, Wolfgang Sauer, and Gerhard Schulz, *Die nationalsozialistische Machtergreifung: Studien zur Errichtung des totalitären Herrschaftssystems in Deutschland 1933/34* (Wiesbaden: Springer, 1960), especially pp. 136ff. For a concise overview, see Frotscher and Pieroth, *Verfassungsgeschichte*, pp. 308-10 and Willoweit, *Deutsche Verfassungsgeschichte*, pp. 310f.

⁸¹ [‘Bis Hitler kam, gab es noch verschiedene Staatsangehörigkeiten in Deutschland. Mein Mann hatte die badische Staatsangehörigkeit, nicht die preußische. Es gab die Bayern, die Sachsen etc. [...] Das wurde dann durch Hitler aufgehoben. Das ist positiv empfunden worden. Mein Mann sagte immer, wenn Hitler eins geschafft hat, dann ist es die Einheit der Deutschen.’] Klaus Humann, Ingke Brodersen, and Susanne von Paczensky, eds., 1933. *Wie die Deutschen Hitler zur Macht verhalfen. Ein Lesebuch für Demokraten* (Reinbek: Rowohlt, 1983), p. 27.

killing programme of that scale could not have been implemented in the power-dividing framework of a federal order.

In light of the atrocities that the Nazi state had committed, a unitary organisation of Germany became a widespread taboo after the end of the war. Power – that was one key conclusion from the Nazi era – should never again be concentrated in the hands of one government. The Americans, British, and French began to create new constituent states in their occupation zones as early as 1946. In February 1947, the Allied Control Council formally abolished the state of Prussia, the former hegemon.⁸² One and a half years later, the western allies made federalism a precondition for the foundation of a new German nation state. In their instructions for the drafting of a common constitution for the western states, they determined that

the constitutional assembly will prepare a democratic constitution that will create [...] a federal form of government, which is best suited to restore the presently shattered German unity, to protect the rights of the states involved, to create an appropriate central authority, and to preserve the guarantee of individual rights and liberties.⁸³

The authors of the 1949 constitution, the *Grundgesetz*, took these directives seriously. As they had witnessed in the Weimar years how a democratic federal order could be demolished piece by piece, they created not only refined federal institutions and procedures, but also made federalism an irrevocable feature of the German state. The so-called ‘eternity clause’ of the constitution prohibits – in addition to a change of the principles relating to basic rights – any

⁸² *Gesetz Nr. 46 Auflösung des Staates Preußen*, 25 February 1947, in *Amtsblatt des Kontrollrats in Deutschland*, 31 March 1947, no. 14, p. 262. On the abolition of Prussia, see Gunther Mai, *Der Alliierte Kontrollrat in Deutschland 1945-1948: Alliierte Einheit - deutsche Teilung?* (Munich: Oldenbourg, 1995), pp. 415-36.

⁸³ [‘Die verfassungsgebende Versammlung wird eine demokratische Verfassung ausarbeiten, die für die beteiligten Länder eine Regierungsform des föderalistischen Typs schafft, die am besten geeignet ist, die gegenwärtig zerrissene deutsche Einheit schließlich wieder herzustellen, und die Rechte der beteiligten Länder schützt, eine angemessene Zentralinstanz schafft, und Garantien der individuellen Rechte und Freiheiten enthält.’] *Richtlinien der Militärgouverneure der USA, Großbritanniens und Frankreichs an die Ministerpräsidenten der westlichen Besatzungszonen*, so-called ‘Frankfurter Dokumente’, printed in Ernst Rudolf Huber, *Quellen zum Staatsrecht der Neuzeit*, vol. 2, 2 vols (Tübingen: Matthiesen, 1951), p. 197. On the Frankfurt Documents, see Bettina Blank, *Die westdeutschen Länder und die Entstehung der Bundesrepublik: Zur Auseinandersetzung um die Frankfurter Dokumente vom Juli 1948* (Munich: Oldenbourg, 1995).

‘amendment [...] that would affect the division of the Federation into *Länder*’ or ‘their participation on principle in the legislative process’.⁸⁴

In the East, the situation was completely different. Already in summer 1945, the Soviet military administration created five new states in order to organise the administration of the occupation zone. Even though these states adopted own constitutions over the next two years, they lost most of their rights when the German Democratic Republic (GDR) was founded in 1949. According to the socialist ideal of a centralised republic, the new constitution vested all legislative and executive power in the central parliament and government, respectively. In addition, the ruling socialist party, the *Sozialistische Einheitspartei Deutschlands* (SED), seized control over the state parliaments in the 1950 elections by preselecting all candidates who ran for office. Two years after that, the remaining functions of the states were transferred to the newly created administrative districts of the republic, the *Bezirke*.⁸⁵ Another year later, the chamber of states, the *Länderkammer*, which had never gained any political importance, was formally abolished.⁸⁶ The states officially continued to exist until 1974, when a reform of the 1968 constitution eliminated all federal elements of the GDR.⁸⁷

In the context of the Cold War, this gradual creation of a unitary state was an important part of the ideological battle with the west. ‘Democratic centralism’ along the lines of the Russian example was the socialist counter model to the federal orders of West Germany and

⁸⁴ [‘Änderung [...], durch welche die Gliederung des Bundes in Länder’], [‘die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung’] GG (1949), art. 79.3. On the guarantee of the federal organisation of the German state, see Matthias Jestaedt, ‘Bundesstaat als Verfassungsprinzip’, in *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, ed. Josef Isensee and Paul Kirchhof, 3rd ed., vol. 2 (Heidelberg: C. F. Müller, 2004), § 29, 785–842.

⁸⁵ *Gesetz über die weitere Demokratisierung des Aufbaus und der Arbeitsweise der staatlichen Organe in den Ländern der Deutschen Demokratischen Republik*, 23 July 1952, GBl. DDR I (1952), no. 99, p. 613.

⁸⁶ *Gesetz über die Auflösung der Länderkammer der Deutschen Demokratischen Republik*, 8 December 1958, GBl. DDR I (1958), no. 71, p. 867.

⁸⁷ On the gradual transformation of the GDR into a unitary state, see Henning Mielke, *Die Auflösung der Länder in der SBZ/DDR. Von der staatlichen Selbstverwaltung zum sozialistisch-zentralistischen Einheitsstaat nach sowjetischem Modell 1945-1952*, Beiträge zur Wirtschafts- und Sozialgeschichte 66 (Stuttgart: Steiner, 1995) and Siegfried Wietstruk, ‘Von den Ländern zu den Bezirken. Die DDR 1949 bis 1952’, *Staat und Recht* 9 (1989).

its main protecting power, the United States.⁸⁸ At least in the first decades of the post-war era, the belief of the SED regime that centralism would eventually triumph over federalism was not totally unfounded. In contrast to the unitary state of the GDR, the federal organisation of West Germany was not underpinned by any distinct ideology. When the *Grundgesetz* was adopted, the federal system it established was primarily legitimised by it being a lesson from the terror of the Nazi era. In other words: the creation of a federal rather than unitary republic was no affirmation of an optimistic vision of the future, but a reaction to the catastrophic development of the past. Just like the imperial and Weimar federal states, which had never enjoyed any deeper legitimacy, their post-war successor lacked a positive *raison d'être*. The federal organisation of Germany was considered necessary for historical reasons, but not beneficial of its own accord. Rather than 'Now more than ever!', the underlying motto of the newly founded federal state was 'Never again!'.⁸⁹

After 1949, this shortage of positive legitimacy became manifest in a long-lasting debate on the most basic features of the federation. The discussion focussed in particular on territorial questions. According to the *Grundgesetz*, the federal territory can be restructured by a federal law that has been approved by a popular referendum.⁹⁰ Already in 1952, Württemberg-Baden, Württemberg-Hohenzollern, and Baden became merged in the new state Baden-Württemberg. Other referenda wanted to reconstitute historic states, such as Schaumburg-Lippe, but failed. The Saarland became the tenth constituent state of the Federal Republic in 1957, after the local population had rejected the proposal of making the small state a European territory within the framework of the Western European Union. In 1973, the

⁸⁸ On Democratic Centralism in the GDR, see Mary Fulbrook, 'Democratic Centralism and Regionalism in the GDR', in *German Federalism. Past, Present, Future*, ed. Maiken Umbach (New York: Palgrave Macmillan, 2002), 172–88. On Democratic Centralism more generally, see Michael Waller, *Democratic Centralism: An Historical Commentary* (Manchester: Manchester University Press, 1981).

⁸⁹ On the character of the *Grundgesetz* as a lesson from the Weimar Republic and the Nazi dictatorship, see Christoph Gusy, ed., *Weimars lange Schatten: 'Weimar' als Argument nach 1945* (Baden-Baden: Nomos, 2003) and Michael Kloepfer, 'Verfassungsgebung als Zukunftsbewältigung aus Vergangenheitserfahrung', in *Kontinuität und Diskontinuität in der deutschen Verfassungsgeschichte. Von der Reichsgründung zur Wiedervereinigung*, ed. Michael Kloepfer et al. (Berlin: Duncker & Humblot, 1994), 35–84. For a concise overview, see Willoweit, *Deutsche Verfassungsgeschichte*, p. 342.

⁹⁰ GG (1949), art. 29.

federal government under Chancellor Willy Brandt appointed a commission that made several proposals for reducing the number of states. The plan eventually foundered on the resistance of the state governments. Moreover, the people showed little to no interest in the proposals.⁹¹

This indifference reflected a long-term change in the debate on federalism. While in the first one and a half decades after the war the discussion had focussed on the most fundamental questions of the federal system, it shifted to more specific regulatory issues at the end of the 1960s, in particular regarding the distribution of legislative competences and fiscal revenue. In 1969, the so-called ‘Große Finanzreform’ greatly reorganised the federal financial system.⁹² For the next four decades, the distribution of competences and the financial relations between the national and state level remained the most fiercely contested matters of federal organisation. In some form or another, these problems appeared on the political agenda on a regular basis.⁹³ It was not until the new millennium, however, that they were addressed by two great reform packages, the Federal Reform Acts I and II.⁹⁴ In June 2017, the federal parliament – the *Bundestag* – and the *Bundesrat* adopted another major reform of the *Grundgesetz*, which strengthened the competences of the national level in exchange for more financial support for the states.⁹⁵

⁹¹ On the development of the debate on restructuring the federal territory, see the detailed study by Reinhard Schiffers, *Weniger Länder - mehr Föderalismus? Die Neugliederung des Bundesgebietes im Widerstreit der Meinungen 1948/49-1990. Eine Dokumentation* (Düsseldorf: Droste, 1996).

⁹² On the reform, see for example Ernst-Adolf Baumann, *Die Finanzreform 1969: ihre Auswirkungen auf den Föderalismus und die Lebensverhältnisse in den Ländern der Bundesrepublik Deutschland* (Munich: Florentz, 1980).

⁹³ See for example the overview provided by Wolfgang Renzsch, ‘Der Streit um den Finanzausgleich. Die Finanzverfassung als Problem des Bundesstaates’, in *Die deutschen Länder. Geschichte, Politik, Wirtschaft*, ed. Hans-Georg Wehling, 3rd ed. (Wiesbaden: Verlag für Sozialwissenschaften, 2004), 373–96. See also Charlie Jeffery's essay ‘German Federalism from Cooperation to Competition’, in *German Federalism. Past, Present, Future*, ed. Maiken Umbach (New York: Palgrave Macmillan, 2002), 172–88.

⁹⁴ *Gesetz zur Änderung des Grundgesetzes (Artikel 22, 23, 33, 52, 72, 73, 74, 74a, 75, 84, 85, 87c, 91a, 91b, 93, 98, 104a, 104b, 105, 107, 109, 125a, 125c, 143c)*, commonly called ‘Föderalismusreform I’, 28 August 2006, BGBl. FRG I (2006), no. 41, p. 2034–8. *Gesetz zur Änderung des Grundgesetzes (Artikel 91c, 91d, 104b, 109, 109a, 115, 143d)*, commonly called ‘Föderalismusreform II’, 29 July 2009, BGBl. FRG I (2009), no. 48, p. 2248–50. On the reforms and the alleged modernisation they brought about, see for example Peter Selmer, ‘Die Föderalismusreform - Eine Modernisierung der bundesstaatlichen Ordnung?’, *Juristische Schulung*, 2006, 1052–60 and Roland Sturm, ‘Föderalismusreform II: “Schuldenbremse”, neoklassischer Glaube an die Steuerbarkeit der Wirtschaft und das altbekannte Instrument der Politikverflechtung’, *Gesellschaft - Wirtschaft - Politik* 4 (2009): 487–99.

⁹⁵ *Gesetz zur Änderung des Grundgesetzes (Artikel 90, 91c, 104b, 107, 108, 109, 114, 125c, 143e, 143f, 143g)*. The law has not yet been published in the federal law gazette. But a report can be found on the website of the

Today, fundamental criticism against federal structures still exists, of course. But it is largely limited to specific areas. The federal segmentation of the education sector, in particular, is at the centre of the public and political debate. Gregor Gysi, the whip of the socialist party *Die Linke*, complained in the *Bundestag* in 2013, for example, that

we have sixteen constituent states, sixteen different school systems and sixteen different curricula. [...] That is nineteenth century. That is the time of stagecoaches. It has absolutely nothing to do with the twenty-first century.⁹⁶

Such views point out that the modernisation of the federal order remains a burning issue. It is commonly agreed across all political parties and levels of government that federal structures must be adapted to the needs of the global and digital age, for example by standardising and improving the education system. However, none of the major political forces calls, on principle, Germany's organisation as a federal state into question anymore. Federalism is now widely considered an essential feature of German statehood that greatly contributes to the country's political stability and economic strength.

The most important reason for this change of opinion has been the great success of the federal system. Under the impression of West Germany's post-war recovery, Golo Mann, one of the nation's most celebrated twentieth-century historians, pointed out in 1951 that

one could almost call it a rule that whenever the German Reich is powerful and makes mischief the German states seem to disappear; but that whenever the fall comes after pride the states are the ones that pay the bill and that have to re-establish order.⁹⁷

Bundesrat http://www.bundesrat.de/SharedDocs/TO/958/tagesordnung-958.html?cms_topNr=51a#top-51a (first retrieved 5 June 2017), Top 51a.

⁹⁶ ['Wir haben 16 Bundesländer, 16 verschiedene Schulsysteme und 16 verschiedene Lehrpläne. [...] Das ist 19. Jahrhundert. Das ist die Zeit der Postkutschen. Es hat mit dem 21. Jahrhundert rein gar nichts zu tun.'] Gregor Gysi in the German *Bundestag*, session 240, 16 May 2013, printed in Plenarprotokoll 17/240, available in the online archive of the parliament: <http://dip21.bundestag.de/dip21/btp/17/17240.pdf> (first retrieved 12 April 2017).

⁹⁷ ['Man könnte es geradezu als Regel aufstellen, daß immer, wenn das deutsche Reich mächtig ist und Unfug stiftet, die deutschen Staaten zu verschwinden scheinen; daß aber, wenn der Fall dem Hochmut folgt, es immer die einzelnen Länder sind, die die Rechnung übernehmen und zunächst einmal wieder leidliche Ordnung schaffen.'] Golo Mann, 'Geschichtsschreibung als Realpolitik (1951)', in *Geschichte und Geschichten* (Frankfurt am Main: Fischer, 1962), p. 274.

If we consider the role of the states after the war, we see that Mann's characterisation could not have been more correct. Based on their competences for infrastructure and urban planning, the states were the chief organisers of the reconstruction of German cities, transport routes, and communication systems. By setting the legal and structural framework for regional industry, agriculture, and services, they laid the foundation of the economic miracle. As they were responsible for all matters concerning refugees and foreigners, they managed the integration process first of the wartime expellees from Germany's former eastern territories and later of the immigrant workers from southern Europe. Moreover, their authority over judicial and police affairs made them cornerstones of the maintenance of law and order in Germany's militant democracy. On the basis of their control over the school and university system, they greatly expanded the education sector in the 1970s and 1980s, thus granting more and more people access to higher education. After the fall of the Berlin Wall, reunification was organised by recreating the five constituent states that the GDR had abolished. The economic reconstruction of the east was carried out as a matter of federal solidarity, with a complex system of subsidy payments being established not only between the national and state level, but also among the different states. Last but not least: the responsibility of the states for education and cultural affairs made them the engine of Germany's transformation into a liberal society that gradually came to terms with its dark past and developed a democratic, pacifist, and European mentality.⁹⁸

On the basis of this success story – which had no equivalent in the imperial and Weimar era – Germany's federal organisation has gained a positive legitimacy at last. For the first time in the history of the German national state, federalism is – despite the widespread criticism against individual arrangements of the federal system – no longer primarily considered an instrument of power, a structural weakness, or a necessary evil, but an anchor

⁹⁸ On the important role of the *Länder* and the federal system since 1949, see for example Roland Sturm, 'Bundesstaatlichkeit', in *Die Bundesrepublik Deutschland. Eine Bilanz nach 60 Jahren*, ed. Hans-Peter Schwarz (Cologne: Böhlau, 2008), 279–99 and Funk, *Kleine Geschichte des Föderalismus: vom Fürstenbund zur Bundesrepublik*, chapters 16 and 18.

of stability and a guarantee of freedom. In short: federalism has become an integral part of German constitutional democracy. When in 2015 the *Bundesrat* celebrated the twenty-fifth anniversary of the first joint meeting of the West and East German state governments, Joachim Gauck became the first Federal President to ever address the council of states. On this occasion, he stressed the change that had taken place since 1949, arguing that federalism has become part of a new political culture:

Federalism is more than a technical form of organisation [...]. In our country, [federalism] stands for a political culture that it has shaped and by which, in turn, it has been shaped. This culture revolves around balancing pros and cons, searching for compromises, and reconciling different interests. This makes decisions sometimes more difficult and limits the ambitions of the political process. Some call this “inertia”. But one can also call it differently, namely “moderation and balance”. And these are the values that are good for our country, in particular in times as turbulent as those we live in today.⁹⁹

Gauck’s remarks put the positive attitude toward federalism that has spread in Germany in a nutshell. It seems that at the beginning of the twenty-first century the Germans have at last overcome the cultural impact of the federal evolution of the Empire. It has taken them almost a century, in which they abolished their monarchy at the end of a world war, replaced a federal democracy with a unitary Führer state that, after bringing about a second world war, implemented the largest killing programme ever organised by a state, and divided the country into a federal republic and a unitary dictatorship – so great was the burden imposed by the legacy that emanated from the development of the imperial union.

⁹⁹ [“Der Föderalismus ist mehr als eine technische Organisationsform [...]. Er steht in unserem Land auch für eine politische Kultur, die er geprägt hat und von der er wiederum geprägt ist. Diese Kultur zielt auf Abwägung, Kompromissfindung und Ausgleich. Das macht Entscheidungen manchmal etwas mühsamer und dämpft die Ausschläge des politischen Pendels. Manche nennen das dann "Schwerfälligkeit". Man kann aber auch anderes dazu sagen, nämlich "Maß und Mitte". Und das sind Werte, die unserem Land guttun, gerade auch in bewegten Zeiten, in denen wir heute leben.”] Joachim Gauck in the *Bundesrat*, 27 November 2015, available in the online archive of the Mediation Committee of the *Bundestag* and *Bundesrat* <http://www.vermittlungsausschuss.de/SharedDocs/texte/15/20151127-rede-gauck-25jahre-16laender.html> (first retrieved 12 April 2017).

Patterns of Union

Some structural features of present-day Germany still stand in the tradition of the federal order of 1871.¹⁰⁰ Apart from a few parallels in the division of competences between the state and national level, three fundamental principles of organisation stand out. Just as in the Empire, the states participate in the national decision-making process by forming a council that consists of representatives of their governments: the *Bundesrat*. This arrangement strengthens the state governments vis-à-vis the parliaments and originates in the *Bundestag* of the German Confederation.¹⁰¹ It is part of a larger system in which the executives of the different state governments dominate the internal relations of the union. Such a system is often called ‘executive federalism’. In other federal unions, the members of the chamber of states are usually either chosen by the state parliaments, such as in Austria, or directly elected by the local electorate, as is the case for the American and Australian Senates.¹⁰²

Since these alternative procedures are more democratic, executive federalism is often criticised. One of the main complaints is that it undermines the division of powers. Indeed, by making the state governments part of the national legislative process, the German federal order intertwines the executive and the legislature with each other. This connection rather than separation of powers is the second major organisational principle that the Federal Republic inherited from the Empire. Unlike the American union, for example, the German

¹⁰⁰ On this issue more generally, see Nevil Johnson, ‘Territory and Power. Some Historical Determinants of the Constitutional Structure of the Federal Republic of Germany’, in *Recasting German Federalism. The Legacies of Unification*, ed. Charlie Jeffery (London: Pinter, 1999), 23–39.

¹⁰¹ On this issue, see Heinz Laufer and Ursula Münch, *Das föderative System der Bundesrepublik Deutschland* (Opladen: Leske, 1998), especially p. 260.

¹⁰² On executive federalism more generally, see Ronald L. Watts, *Executive Federalism: A Comparative Analysis* (Ontario: Institute of Intergovernmental Relations, Queen’s University, 1989) and Philipp Dann, *Parlamente im Exekutivföderalismus: Eine Studie zum Verhältnis von föderaler Ordnung und parlamentarischer Demokratie in der Europäischen Union* (Berlin: Springer, 2004).

federal state does not divide the three powers by a system of checks and balances, but merges them in a concert across the different levels of government.¹⁰³

Lastly, like the imperial constitution, the *Grundgesetz* generally confers the right to implement national laws on the states.¹⁰⁴ In the Empire, this provision originated in the lack of a constitutionally defined national administration. Today, there is a wide range of federal ministries, agencies, and other national authorities. Nevertheless, the separation of law-making and law enforcement persists as matter of principle. It has become a core feature of executive federalism in Germany. While nowadays the great majority of laws are adopted on the national and European level, most of them are implemented by the states.¹⁰⁵

These systemic similarities between Imperial and present-day Germany show us that there is a structural tradition of federal organisation that continues to this very day. All systems of multi-level government face similar systemic problems to which there is only a limited number of possible solutions. Hence, the structural observations that we can infer from the federal evolution of the Empire are relevant for federal orders more generally.

The importance of historically grounded insights into federal organisation can hardly be overestimated. Since the nineteenth-century federalism has spread around the globe. Today, forty per cent of the world's surface are covered by federal states. These include many global and regional powers, such as the United States, Canada, Mexico, India, Nigeria, and Australia. More than fifty per cent of the world's population live in some form of federal order, and this share is constantly increasing.¹⁰⁶ Many international and supranational organisations have a federal character. Among these, the European Union (EU) stands out, because it features a particularly high degree of political integration.

¹⁰³ On this feature of German federalism and the controversies surrounding it, see Ute Wachendorfer-Schmidt, *Politikverflechtung im vereinigten Deutschland*, 2nd ed. (Wiesbaden: Springer, 2005).

¹⁰⁴ GG (1949), art. 83-85.

¹⁰⁵ On this topic, see Christian Heitsch, *Die Ausführung der Bundesgesetze durch die Länder* (Tübingen: Mohr, 2001) and Joachim Suerbaum, *Die Kompetenzverteilung beim Verwaltungsvollzug des Europäischen Gemeinschaftsrechts in Deutschland*, Schriften zu Europäischen Recht 50 (Berlin: Duncker & Humblot, 1998).

¹⁰⁶ Numbers are taken from European Center for Research on Federalism, ed., *Europäischer Föderalismus im 21. Jahrhundert* (Nomos, 2003), p. 32.

While it is fiercely contested whether the EU has already evolved into a federation, is still a confederation, or constitutes a new type of multi-level order, there can be no doubt that it shares many structural features with Imperial Germany.¹⁰⁷ It must suffice here to name only the most important ones. Like the Empire, the EU does not have a proper constitution. Its legal basis is a set of treaties that is often regarded as a constitution. The imperial constitution too had a composite character, for it was merely a federal law that harmonised the contractual foundations of the union, the unification treaties of 1867 and 1870. Moreover, the EU resembles the Empire in lacking an official government. In both federal orders, governmental functions are or were conferred on a bureaucratic apparatus, namely the Commission and the *Reichsämtler*, respectively. Together, the Council and the Commission form a collegiate executive that faces the parliament in the legislative process. The same was true for the state secretaries and the Chancellor, the so-called *Reichsleitung*. Furthermore, the EU too features a system of executive federalism. The member states participate in the decision-making process of the Union primarily via the Council of Ministers, which consists of representatives of the state governments. Besides, just like the Empire the EU leaves the enforcement of laws to the states.¹⁰⁸

In the light of these parallels, it is reasonable to suppose that the federal evolution of the Empire may have resonances for the EU and the ongoing discussion about a fundamental reform. Pointing to these resonances seems important today, because the EU is at a

¹⁰⁷ On the controversy about the organisational nature of the European Union, see the interesting historical perspectives by Ralph Bollmann, 'Staatenbund oder Bundesstaat: Heiliges Römisches Europa', *Frankfurter Allgemeine Zeitung*, 10 November 2012, available online <http://www.faz.net/aktuell/wirtschaft/staatenbund-oder-bundesstaat-heiliges-roemisches-europa-11957028.html> (first retrieved 12 April 2017) and Kristoferitsch, *Vom Staatenbund zum Bundesstaat?: Die Europäische Union im Vergleich mit den USA, Deutschland und der Schweiz*. See also the critical article by Albert Funk, 'Europa ist schon längst ein Bundesstaat', *Der Tagesspiegel*, 15 July 2015, available online <http://www.tagesspiegel.de/meinung/essay-europa-ist-schon-laengst-ein-bundesstaat/6879848.html> (first retrieved 12 April 2017).

¹⁰⁸ For comparative reflections on the federal systems of the European Union and Imperial Germany, see for example Stefan Oeter's essay 'Die föderale Gestalt der Europäischen Union - Vergleichende Überlegungen im Blick auf das Kaiserreich und die Donaumonarchie', in *Föderalismus in historisch vergleichender Perspektive*, ed. Gerold Ambrosius, Christian Henrich-Franke, and Cornelius Neutsch, vol. 2 (Baden-Baden: Nomos, 2015), 299–325. For a comparison of a concrete structural issue, see the essay by Gerold Ambrosius and Christian Henrich-Franke, 'Regulierung und Steuerung von Infrastrukturen in föderalen Systemen - Eisenbahnen im Deutschen Reich von 1871 und in der Europäischen Union heute', in *ibid.*, 249–77.

crossroads. For the first time in its history, it will lose one of its member states. But Brexit is a symptom rather than a disease. Britain is not the only country that is dissatisfied with the EU. The other twenty-seven states are drifting apart, too. The Euro Crisis has produced a rift between southern and northern states about the right course of fiscal, economic, and social policies. Solidarity is further strained by the great wave of immigrants from war-torn Syria and North Africa. The member states have failed to agree on a common refugee policy, with some states shutting and others opening their borders. In addition, the aggressive foreign policy of Russia following the annexation of Crimea and the election of US President Donald Trump, who calls the traditional transatlantic security architecture into question, are forcing Europe to redefine its role in the world.

All this confronts the EU with the decision of whether to either redefine the treaties and to devolve power back to the nation states or to create a more coherent European constitution that will further deepen integration. In March 2017, the President of the Commission Jean-Claude Juncker presented five different scenarios for Europe's future, ranging from confining the Union to the maintenance of a common market to increasing its powers across all fields and levels of government.¹⁰⁹ On the occasion of the sixtieth anniversary of the Treaty of Rome, which had founded the European Economic Community in 1957, the leaders of the member states adopted a joint declaration that opted for a middle course often called 'multi-speed Europe'.¹¹⁰ This idea wants integration to take place at different levels and paces, depending on the political situation in each individual country. Apart from expressing a

¹⁰⁹ European Commission, *White Paper on the Future of Europe. Reflections and scenarios for the EU 27 by 2025*, 1 March 2017, available on the website of the Commission https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf (first retrieved 12 April 2017). See also the accompanying press release by the Commission, 1 March 2017, http://europa.eu/rapid/press-release_IP-17-385_en.htm (first retrieved 12 April 2017).

¹¹⁰ Rome Declaration of the Leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, 25 March 2017, available on the website of the Commission http://europa.eu/rapid/press-release_STATEMENT-17-767_en.htm (first retrieved 12 April 2017).

principled commitment to a common future, however, this concept seems to create at least as many problems as it solves.¹¹¹

In view of this situation, what concrete implications does the federal evolution of Imperial Germany have for current and future European structural arrangements? Six observations spring to mind. First, the development of the Empire is a textbook example of how the existence of a hegemonic power among the member states can create an almost never-ending chain of structural problems that have the potential to paralyse the whole union. The dependency of the Reich on Prussia prevented the emergence of an independent national government, obstructed the work of the Chancellor as chief executive of the union, and reduced the other states to mere bystanders in the federal decision-making process. As a result, Prussia's hegemony made federal government completely dysfunctional. For the EU, the lesson is obvious. Any great structural reform must create institutional conditions that prevent Germany's economic dominance from translating into outright political hegemony while guaranteeing every state – including Germany – a fair share in the Union's decision making process. Defining such a system will be extremely difficult. But some possible steps in the right direction emerge from a comparison of the EU's current predicaments with the history of the Prussian-German dualism. The administrative institutions of the EU must be strictly separated from those of the states. To this end, the Union must be equipped with a completely independent ministerial apparatus, which is competent and big enough to prepare bills and enforce laws, and the role of the state governments must be confined to participating in the Council or a newly created second chamber of a bicameral legislature. Moreover, if the principle of unanimity among the state governments is ever dropped in favour of a majority voting system – a measure that would greatly improve the Union's scope of action – it will be

¹¹¹ See for example the assessments by Ruth Berschens, 'E.U. Leaders to Back Multi-Speed Europe at Summit', *Handelsblatt Global Edition*, 22 March 2017, available online <https://global.handelsblatt.com/politics/e-u-leaders-to-back-multi-speed-europe-at-summit-733270> (first retrieved 12 April 2017) and Valentina Pop, 'Once Scorned, "Multispeed Europe" Is Back', *The Wall Street Journal*, 1 March 2017, available online <https://www.wsj.com/articles/once-scorned-multispeed-europe-is-back-1488388260> (first retrieved 12 April 2017).

necessary to balance very carefully the distribution of votes; to establish special voting requirements for certain decisions, such as constitutional amendments; and to define the voting procedure so closely that it cannot be manipulated as easily as was possible in the imperial *Bundesrat*.

Second, the federal evolution of the Empire shows that without a well-defined constitution a federal union can gradually implode. The lack of a clear legal framework permitted rival power centres to emerge, whose struggles destabilised federal government. It also facilitated the transformation of Germany into a unitary state. The EU is already displaying symptoms of a similar evolution: intense competition between different institutions, above all the Council, the Commission, and the Parliament, as well as a creeping centralisation in Brussels. In order to prevent a further perversion of federal structures, the EU will sooner or later have to adopt a coherent constitution. Such a charter must explicitly define the Union as a federation, simplify institutional structures, stipulate clear powers and functions of the different organs, and strictly delimit European from national competences.

Third, the history of Imperial Germany suggests that it is unwise for a federal union to create a powerful fulcrum on which the coordination of the whole system depends. Under Bismarck, the Chancellor acquired precisely this position. The consequences of this concentration of power were terrible. It exacerbated the antagonism between the federal executive and the *Reichstag*, marginalised the state governments, and fostered the centralisation of the union. After Bismarck's dismissal, matters got worse. As none of his successors matched his personal authority, they failed to exercise the coordinating functions that their office had gained. The resulting power struggle between the different institutions made federal government sink into chaos. In light of this development, the popular proposal that the President of the Commission should be directly elected by the people and, in turn,

receive more powers does not appear as a good idea.¹¹² Such a measure promises to create major difficulties, in fact, unless it is accompanied by a comprehensive reform of the overall institutional framework.¹¹³ Rather than concentrating power in one office, it seems healthier to create a better equilibrium between the institutions that represent the different forces in the EU, namely the state governments, the parliament, and the European executive. In short: a new and simpler system of checks and balances is needed that makes European decision-making more transparent and saves the Union from experiencing the same volatility of constitutional functions as the imperial federation.

Fourth, the evolution of the Empire demonstrates what can happen if a federal union lacks a coherent system of constitutional jurisdiction: legal problems easily turn into issues of power, federal integration follows no orderly course, and – as a result – the union loses its systemic stability, with every conflict having the potential of putting it on the brink of dissolution. While over time the Imperial Court became responsible for many questions, it never gained the right to address conflicts about the competences of the federal constitutional organs and to review the constitutionality of laws. Although the European Court of Justice is much more powerful, it is not an official, fully-fledged constitutional court. It is true that if we view the treaties as a comprehensive set of constitutional norms, the European Court does

¹¹² For this proposal, see for example the article by former British Prime minister Tony Blair, ‘It’s Time for the Direct Election of a European President’, *Huffington Post*, 26 November 2012, available online http://www.huffingtonpost.com/tony-blair/its-time-for-the-direct-e_b_2191918.html (retrieved 12 April 2017) or the speech by Germany's Finance Minister Wolfgang Schäuble on the occasion of him receiving the Charlemagne Prize 2012, 17 May 2012, available on the website of the Charlemagne Prize <http://www.karlspreis.de/de/preistraeger/wolfgang-schaeuble-2012/rede-von-dr-wolfgang-schaeuble> (first retrieved 12 April 2017). According to a poll by Eurobarometer from May 2014, seventy per cent of all European citizens are in favour of a direct election of the President of the Commission, see the website of the European media platform EURACTIV <http://www.euractiv.de/section/europawahlen-2014/news/europaerwollen-direktwahl-des-kommissionsprasidenten/> (first retrieved 12 April 2017).

¹¹³ See for example the critical remarks by the legal scholars Christian Joerges and Florian Rödl, ‘Direktwahl des EU-Kommissionspräsidenten: Mehr Schaden als Nutzen’, *Verfassungsblog*, 26 June 2012, <http://verfassungsblog.de/direktwahl-des-eukommissionsprasidenten-mehr-schaden-als-nutzen/> (first retrieved 12 April 2017) and the view of the former President of the European Council Herman van Rompuy ‘Van Rompuy: Direktwahl eines EU-Präsidenten wäre „absurd“’, *Deutsche Wirtschaftsnachrichten*, 1 December 2012, <http://deutsche-wirtschafts-nachrichten.de/2012/12/01/van-rompuy-direktwahl-eines-eu-praesidenten-waere-absurd/> (first retrieved 12 April 2017). For a more detailed analysis of the chances, problems, and consequences of a direct election of the Commission President, see Jared Sonnickson, *Ein Präsident für Europa: Zur Demokratisierung der Europäischen Union* (Wiesbaden: Springer, 2014), especially chapter 4, pp. 242ff.

carry out the main functions of a constitutional court. For example, it regularly decides questions about the allocation of powers among the various European institutions and defends fundamental rights.¹¹⁴ However, there is no hierarchy between the European Court and the constitutional courts of the member states. The implementation of European law depends on the cooperation of the national judiciaries – it is for them to review whether European laws are correctly implemented by the member states. Until the European Court gains clear supremacy over national constitutional courts and the right to review both federal and national laws on its own initiative, national judiciaries can stop European integration in its track and national governments can easily subvert the legal framework of the Union by making political deals among them.¹¹⁵ From this point of view, the EU must develop a more coherent system of constitutional adjudication.

Fifth, the example of Imperial Germany shows that federalism without democracy does not work. The power-dividing structures of federal organisation can only be held together if they are based on a common framework of popular sovereignty. It was one of the main structural reasons for the disintegration of the imperial federal order that governmental functions were not carried out by a proper national government, but by a range of supreme administrative bodies – the *Reichsämtler* – that the constitution did not make responsible to the parliament. This arrangement caused a permanent struggle between the federal bureaucracy and the *Reichstag*, induced the federal administrative apparatus to claim more and more competences and to grow continuously, and thus encouraged an ever-increasing centralisation that pushed the states to the margin. In the EU, the situation is strikingly similar: the relationship between the Commission and the parliament is characterised by confrontation rather than cooperation;

¹¹⁴ On the character of the European Court of Justice as a constitutional court, see for example Bo Vesterdorf, 'A Constitutional Court for the EU?', *International Journal of Constitutional Law* 4, no. 4 (2006): 607–17, which includes a good overview of the relevant literature.

¹¹⁵ On the lack of hierarchy in the European judicial system, see the article by Birkbeck law professor Michelle Everson, 'Is the European Court of Justice a Legal or Political Institution Now?', *The Guardian*, 10 August 2010, available online <https://www.theguardian.com/law/2010/aug/10/european-court-justice-legal-political> (first retrieved 12 April 2017).

the bureaucratisation of the Union is widely considered one of its biggest problems; and many states feel threatened by the constant shift of competences to Brussels, a development that was one of the key arguments of the Brexit supporters. The implication from the imperial German case is clear: if the EU wants to avoid disintegration, it needs to tackle its democratic deficit. Most importantly, the Commission must be transformed into an official European government that is elected by and responsible to the parliament. In other words: popular government must take the place of bureaucratic government.¹¹⁶

Sixth and lastly, the federal evolution of the Empire and the long shadow that it cast over Germany's history in the twentieth century are a warning that a federal order cannot thrive unless politics and society show basic respect for federalism as an organisational principle. The imperial union imploded and sent Germany down the road toward the abyss because its power-dividing structures were merely seen as either an obstacle to or an instrument of power that could be manipulated at discretion. Disrespect for Europe's federal organisation takes a different form, but is just as harmful. The structures and procedures of the Union are often criticised as cumbersome, overly bureaucratic, and undemocratic. The political discord between the member states in the Financial Crisis of 2007/2008 and in the ongoing European Debt Crisis has further reinforced the view that the Union is unable to solve important problems. Indeed, it has almost become a commonplace to condemn Brussels as a den of corruption for a political elite that wastes money, dictates the shape of bananas, and is out of touch with the people.¹¹⁷ As a result, the EU is gradually losing legitimacy, while nationalist parties, such as the UK Independence Party, the French *Front National*, and the German *Alternative für Deutschland*, gain ground. But after Brexit, there has also been a rise of

¹¹⁶ On the democratic deficit of the European Union, see for example Koen Lenaerts and Nathan Cambien, 'The Democratic Legitimacy of the EU after the Treaty of Lisbon', in *European Constitutionalism beyond Lisbon*, ed. Jan Wouters, Luc Verhey, and Philipp Kiiver (Antwerp: Intersentia, 2009), 185–207.

¹¹⁷ On popular prejudices against the EU and its allegedly nonsensical legislation, in particular in the context of the Brexit campaign, see for example Jon Henley, 'Is the EU Really Dictating the Shape of Your Bananas?', *The Guardian*, 11 May 2016, available online <https://www.theguardian.com/politics/2016/may/11/boris-johnson-launches-the-vote-leave-battlebus-in-cornwall> (first retrieved 12 April 2017).

support for the Union, in particular among the young. Pro-European movements like Pulse of Europe or Young European Federalists show that the commitment to Europe is not dead yet.¹¹⁸ Their political activism reminds us that in order to save the Union it is necessary to develop a new political culture that understands federalism as the best possible form of organisation for Europe. Social movements can do much, but not enough. It is for the Union to take action and to create conditions under which such a positive attitude toward European federalism can flourish. The most important step in this direction is probably a reform that makes the EU more democratic. But the history of the Weimar Republic shows that, on its own, democratisation does not suffice. Rather, the EU must strive to do the same as the Federal Republic after the war, namely legitimising its federal organisation by making it a success. The only way to do this is to tackle head-on the socio-economic problems that move the European people – for example the high unemployment of the young, the growing national debts, and the consequences of Brexit. Unless it wants to become superfluous, the EU must prove that it has the capacity to solve these problems.

Institutionalising a structural balance between the states, adopting a proper constitution, establishing a more refined system of checks and balances, creating a hierarchical organisation of constitutional adjudication, introducing a parliamentarily responsible government, and developing a pan-European culture of federalism – taken together, these implications of the imperial German case mean that the EU must fundamentally change. In fact, they suggest nothing less than that if the Union wants to overcome its structural problems and prepare for a long life, it must develop into a fully-fledged republican federal state: the United States of Europe. At the time of writing, this seems completely unrealistic. Centrifugal forces are strong in Europe and have culminated to date in the Brexit vote. In March 2017, the very month when the UK government officially declared its withdrawal from

¹¹⁸ See the websites of these movements at <http://pulseofeurope.eu> and <https://www.jef.eu/home/> (first retrieved 12 April 2017).

the Union, the President of the Commission picked up on the widespread scepticism vis-à-vis a further deepening of European integration, arguing in an interview that ‘we will never see the European Union become a state’.¹¹⁹

But such reservations seem to be based on a misunderstanding of what a European federal state can – or, indeed, must – look like. Federalism does not mean assimilation, but preserving diversity in a coherent public framework. Present-day Germany as well as the United States and Switzerland are prime examples of this potential, which a European federal state must fully exploit. In order to do so, it must allow the member states at once to keep their cultural identity and most of their political sovereignty, while also coordinating their mutual relations in a new, more efficient, and more democratic way. In concrete terms, this means that a European federal state does not need to have more competences vis-à-vis the member states than the existing Union. To the contrary: European government should concentrate on those fields that individual states of the relatively small size of the European powers can no longer sensibly handle on their own in a globalised world. Most importantly, these areas include foreign and security policy, monetary policy, the common market, and some parts of employment and social policy. All other powers could either remain with or be devolved back to the member states. In short: a European federal state does not have to be a homogenous superstate. Rather, it must be a federation that is institutionally more integrated, but functionally more decentralised than the current Union.

Whatever form a grand-scale reform of the European Union will take, it must be based on a belief in the benefits and chances of federalism. The example of Imperial Germany is a warning that Europe must not allow its structural evolution to be dependent on power interests. Showing respect for federal organisation is the key to a healthy development. This

¹¹⁹ [‘Wir werden nie erleben, dass die Europäische Union ein Staat wird.’] Jean-Claude Juncker in an interview with the news programme *heute* of the German public channel ZDF, 25 March 2017. <http://www.heute.de/60-jahre-roemische-vertraege-eu-staats-und-regierungschefs-verabschieden-erklaerung-und-betonen-unterschiede-46833556.html> (first retrieved 12 April 2017).

may be asking too much. But one should remain optimistic. Europe has learned much from the history of the nineteenth and twentieth centuries. So why not in this case, too?

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APPENDIX

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